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In The

Supreme Court of the United States

October Term, 1992

ROBERT F. COLLINS,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether the government's pre-trial polling of prospective jurors in the Eastern District of Louisiana on attitudes and beliefs in constitutional principles and defendant's guilt and the government's exclusive knowledge and use of those poll results violated Robert F. Collins' rights to due process and a fair trial.

2) Whether the procedure used by the trial court to address objections under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986) was so flawed and the government's reasons for peremptorily challenging black jurors so transparent as to amount to racial discrimination and a denial of equal protection to Robert F. Collins.

3) Whether the prosecutor violated Robert F. Collins' Fifth Amendment right against self-incrimination by commenting on his failure to testify at trial or by commenting on his pre-arrest silence.

4) Whether it is a denial of due process to use a pre-guideline offense of a third party as the basis for sentencing under the Sentencing Guidelines.

LIST OF PARTIES AND RULE 29.1 LIST

The parties to this case are the petitioner, Robert F. Collins, co-defendant John H. Ross and the United States of America as respondent.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Robert F. Collins, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals, Fifth Circuit, entered in the above-entitled proceeding on September 10, 1992.

OPINIONS BELOW

The opinion of the United States Court of Appeals, Fifth Circuit, entered on September 10, 1992, is reported at 972 F.2d 1385 and is reprinted in the appendix hereto, p. 1a, *infra*.

JURISDICTION

The Court of Appeals, opinion was filed on September 10, 1992. Petitioner now invokes the jurisdiction of this Court pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendments V and XIV to the United States Constitution are set forth in Appendix G.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS AND DISPOSITION IN COURTS BELOW

United States District Judge Robert F. Collins and co-defendant John Ross were indicted in the United States District Court for the Eastern District of Louisiana on May 8, 1991, and charged in a three-count indictment alleging conspiracy, bribery, and obstruction of justice. The case proceeded to trial on June 17, 1991, and at the conclusion of the trial both defendants were found guilty on all counts. The defendants filed motions for new trials, and after a hearing on September 5, 1991, the court

denied the motions. Appendix D, *infra.* Judge Collins was sentenced to serve a term of imprisonment of 60 months as to count one, 82 months as to count two, and 60 months as to count three, with the sentences as to counts one and three to run concurrently with the sentence imposed in count two.

The defendants timely appealed their convictions and sentences to the United States Court of Appeals for the Fifth Circuit. The Court of Appeals affirmed the convictions and sentences. *United States v. Collins,* 972 F.2d 1385 (1992). From that ruling the defendant Robert F. Collins petitions this Court for a writ of certiorari.

B. STATEMENT OF FACTS

The Court of Appeals devoted [illegible] of its opinion setting forth the factual contentions espoused by the government. It devoted one paragraph to the contentions of the defendants. Petitioner will resist the temptation to reargue his innocence, recognizing that is not the function of this writ. However, for the Court to understand the significance of the constitutional issues to be presented *infra,* it is necessary for it to have a more balanced presentation of the factual background.[1]

The operative figures in the case were Judge Collins, United States district court judge for over twelve years; John Ross, a close friend of Judge Collins who, in addition to being a real estate agent was also a member of the Regional Planning Commission and Vice President of the New Orleans Levee Board; Gary Young a convicted drug dealer; and John Yemelos, a real estate developer. In an effort to launder his drug money, Young worked with

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[1] The following factual background complete with citations to the record is set forth in defendant's brief to the Court of Appeals for the Fifth Circuit, reprinted as Appendix H.

Yemelos in real estate ventures. One of their businesses through which they ran the drug money was Bart's Restaurant, located on Levee Board property in New Orleans. While Young in fact owned the restaurant, Yemelos was the ostensible owner and Young pretended to be nothing but a manager working there. Because of the location of their restaurant, both Yemelos and Young had occasion to have dealings with John Ross in his position as Vice President of the Levee Board. Young claimed that some of those dealings had to do with illegal bribes, but Ross denied that.

Ross testified that what he had agreed to do with Yemelos was to form a minority contracting and maintenance company. Yemelos reasoned that since Ross was black, he could get a lot of contracts that were reserved for "minority-set aside" program. Yemelos had agreed to invest $100,000.00 in that venture. The existence of the venture was not established simply by the testimony of Ross. While Yemelos invoked the Fifth Amendment when he was called as a witness, a third party was present at the discussions regarding Mahogany, Inc. Yemelos and Ross attempted to get a contractor by the name of Larry Gibbs to become associated in the company. While Gibbs testified that he determined not to become involved, he was able to verify that the formation of Mahogany, Inc., was something that was being planned long before Gary Young had any reason to bribe anyone.

There were only two witnesses to Young's extensive drug dealings. One was murdered just before he was supposed to testify in front of the grand jury regarding Young's activities. The other was a person by the name of Roy Anselmo who had fled the country. However, in July 1989 Anselmo attempted to return and was arrested in Miami. Young realized that he was certain to be indicted, and he therefore had his attorney make a deal with the

government that he would plead guilty and cooperate if the government would agree to have his case transferred to Judge Collins' court.

Ross had for many years bragged about his friendship with Judge Collins. Young attempted to discuss with Ross the possibility of bribing Judge Collins. Both Young and Ross acknowledged that these overtures were made. Young claimed that Ross was receptive and Ross claimed that he was not. While Young had the equipment and the knowledge to record the conversations with Ross, he denied having done so during those original overtures to Ross. However, Ross' testimony regarding his rejection of Young's suggestion of a bribe seems to have been correct. Ross claimed that he refused to discuss the matter with Young, and in the first conversation that Young admits recording – a meeting between him and Yemelos – he complained to Yemelos that "that nigger won't talk to me." Young was seeking the intervention of Yemelos to help him with Ross.

Yemelos in fact met with Ross and asked Ross to assist Young with his criminal problems, which Yemelos described as being some minor tax matters. While Yemelos did not directly tie together the funding of Mahogany, Inc., with the assistance to Young, he did tell Ross that Young was going to be handling that project for him. Therefore, Ross was required to meet with Young and at the meeting, which Young recorded, Young tied in the payment of the $100,000.00 to Ross's agreement to assist Young with the anticipated criminal case.

Ross testified that he felt that what Young was doing to him was wrong, and he therefore determined that he would "con" Young into believing that he was going to bribe Judge Collins when in fact he had no intention of doing so. Since it appeared from what Yemelos and Young had told Ross that Young's legal problems were

minor, and since Ross was in fact a good friend of Judge Collins, Ross felt that he could take the money from Young and in fact be able to help him with his sentence. Ross also knew that Judge Collins had some commercial property for sale, and Ross felt that by investing part of the money from Young as a downpayment on that property he could use those transactions as opportunities to discuss Young's situation with Judge Collins.

Of course, it turned out that Young's legal problems were much more serious than originally had been represented to Ross, and in a series of meetings with Ross, Young paid to Ross various increments toward the promised $100,000.00. Ross assured Young that one-half of the money was going to Judge Collins.

No such amount was ever paid to Judge Collins. To the contrary, he only received the promised one-third downpayment on the commercial property which he was selling. To secure continued payments from Young, Ross promised him that he would "get no jail time." For his part Judge Collins did nothing more than tell Ross that if his friend wanted some consideration in sentencing he should fully cooperate with federal investigators who were working on related drug cases. This advice from Judge Collins was repeated a number of times on the tape-recorded conversation between Ross and Young. Judge Collins had every reason to believe that Young was cooperating with the government because it was the First Assistant United States Attorney who, together with the defense attorney for Young, requested that Judge Collins accept the transfer of Young's case. Such an accommodation by the prosecutor was a clear indication that Young was working in concert with the government.

Of course, when Judge Collins received the pre-sentence report, he discovered that Young's record, and criminal involvement, were much more extensive than

had been represented to him by Ross. When Judge Collins did not receive the standard letter of cooperation from the government, he called the prosecutor who had requested him to accept the transfer and inquired about the absence of the letter. The prosecutor, who was of course working with the investigators to make a case against Judge Collins, lied to him and told him that no letter of cooperation was being sent because Young had not in fact been able to offer any cooperation that was of any benefit to the government. The prosecutor explained to Judge Collins that the reason for this was that Young had not been involved in any criminal activity for so many years that Young simply did not have any current information that could assist the government.

Judge Collins spoke with Ross and explained to him the information disclosed in the pre-sentence report and informed Ross that there was simply no way that he could give any consideration to Young of the type which Ross was seeking. Judge Collins did note, however, that he was not disposed to give Young as long a sentence as had been recommended by the probation officer. He did not tell Ross what sentence he was in fact going to give.

Upon realizing that he had taken a large amount of money from Young and was not going to be able to deliver on his promise of no jail time, Ross then met with Young to start preparing him for that failure. Ross took all of the information which Judge Collins had given to him as an explanation of his inability to help and conveyed that to Young in an effort to convince Young that Ross did in fact have a special rapport with Judge Collins. Judge Collins sentenced Young to 42 months in prison, which sentence, according to the chief probation officer and Young's defense attorney who both testified at trial, was exactly the length of sentence they would have expected Judge Collins to have imposed. Ross did not

even know what sentence Young had received and had to call Young's attorney to get that information. Ross then called Young and tried to take credit for it being as lenient as it was.

Young, of course, continuing to work with the government, expressed dissatisfaction to Ross and paid him the final $30,000.00 toward the $100,000.00 total and requested him to speak to Judge Collins about the possibility of reducing the sentence under Rule 35 of the Federal Rules of Criminal Procedure. Ross did in fact go speak with Judge Collins and was told that while Young had a right to file the motion if he desired, Judge Collins believed that the sentence was correct and was not disposed to reduce it. After that meeting the F.B.I. immediately executed a search warrant on the person, automobile and chambers of Judge Collins expecting to find that he had in his possession half of the final $30,000.00 payment. He, of course, did not because the bribery scheme which Ross had explained to Young was fictitious.

Judge Collins did have the $16,500.00 which had been paid toward the purchase of the property. At the time of the search the agents also served Judge Collins and John Ross with *instanter* subpoenas to deliver to the grand jury *any documentation* that they had regarding the property sale. They had no such documentation, but then the final portion of the downpayment had only been paid to two days earlier. At the time of trial the agents were to contend that Judge Collins and Ross had denied to them the existence of any real estate transaction. Ross testified that he did not deny the transaction, but only denied the existence of the records for which they were searching and for which they had issued a subpoena.

There was nothing in the recorded conversations between Judge Collins and Ross that in any way related

to a bribe. There was conversation regarding the sale of the property, but the government contended at trial that the "sale" was just a guise to cover the bribe. The government was able to offer no explanation as to why the defendants would have had a cover story of a real estate transaction to disguise the bribe and then deny the existence of any such real estate transaction when they were accused of the bribe.

Before trial, the government caused a poll to be conducted of potential jurors in the Eastern District of Louisiana to determine their views regarding the case. The particulars of the poll will discussed in the argument section of this application.

When the defense found out that the government was conducting such a poll, counsel for the defendants brought it to the attention of the trial judge. He ordered that the government cease any further polling and that it turn over to him the results of the polling that had so far been conducted. The trial judge further ordered that the defendants *not* take any poll of their own, and he refused to allow the defense to have access to the polling information which the government had secured. Appendix I, *infra*. While disallowing the defense access to the poll, the trial judge assured defense counsel that there was no information of any significance which the government had secured and to the contrary the poll was nothing more than a "red herring." Appendix B, *infra*. At the conclusion of the trial, the defense was given the poll and the poll results and determined that it contained significant information that was useful to the government in the trial of its case and was detrimental to the defendants.

During the selection of the jury, the government used three quarters of its available peremptory challenges to strike black jurors even though the members of the black race comprised only one-fourth of the jury venire. The

defense complained of the obvious violation of this Court's holding in the case of *Batson v. Kentucky*. 476 U.S. 79, 106 S.Ct. 1712 (1986), but without conducting any hearing the trial court overruled the objection and dismissed the venire. Then two days later during a trial recess the court allowed the government to submit on the record reasons why it maintained its challenges were race-neutral.

Judge Collins, relying on his presumption of innocence and his Fifth Amendment right against self incrimination, determined not to testify on his own behalf. The prosecutor in his rebuttal closing arguments specifically and egregiously called the jury's attention to his failure to have testified. The prosecutor turned and pointed at Judge Collins and in a loud voice challenged him as to why he did not "tell us" the facts which defense counsel had argued. The defense objected to this tactic and moved for a mistrial. At that time the government counsel responded that he was not commenting on the defendant's failure to testify at trial but rather was commenting on Judge Collins' failure to have told the agents at the time of the search in his chambers that the money they found was for a real estate transaction. In their motion for a new trial, the defendants pointed out that even if *that* had been what the prosecutors were commenting about – and the defense strongly maintained it was not – the argument still would have been an impermissible comment regarding the defendant's Fifth Amendment rights. The defense pointed out that at the time the money was found in Judge Collins chambers he had already told the agents that he did not want to say anything until he had had an opportunity to consult with an attorney. Recognizing that the defense was correct in that position, the government then shifted and stated that what it was referring to in closing argument was Judge

Collins' failure to have given the explanation when he was being transported in the F.B.I. vehicle back to his chambers for purposes of the search.

REASONS FOR GRANTING THE WRIT

A. GOVERNMENT POLLING AND EXCLUSIVE USE OF POLL RESULTS VIOLATED CONSTITUTION

This Honorable Court should grant certiorari because of the government's "outrageous" polling of prospective jurors prior to the trial of this case. As noted, before the trial began, defendants learned and brought to the attention of the district court that the government was conducting a poll in regard to the trial. Defendants knew that the government was polling prospective jurors, which the government admitted, but the defendants did not know the extent of the poll, the extent of the sampling of the poll, the questions asked or the poll results. During a hearing on May 16, 1991, the district court after first learning of the poll called it an "outrageous procedure" and ordered the prosecution to cease polling immediately and give the poll and its results to the court for review. *The court also ordered the defendants not to conduct any poll.* The trial court also "condemned" the government's polling procedure, adding it was inconsistent with the title "Department of Justice" for the government to be taking a poll of prospective jurors. Appendix I, *infra.*

However, in a complete reversal, subsequently during a telephone conference among counsel and the court on June 5, 1991, the trial court refused to turn over the poll and its results to the defendants. Appendix B, *infra.* The court stated that it had reviewed the poll and the results and that nothing had been done to compromise the integrity of the jury and that, if anything, the poll was no more than a "red herring of the first order." Appendix

B, *infra*. Defendants objected to this court's decision during this conference. Then, only *after* the trial did the district court give the poll and its results to defendants.

Judge Collins submits that the polling by the government and the government's subsequent sole possession and/or use of the poll were not a "red herring" but a devastating violation of petitioner's Constitutional rights. The poll in form and substance coupled with the government's exclusive knowledge of the poll improperly and insidiously infected the trial such that Judge Collins' due process right was violated. This right was further violated when Judge Collins was ordered not to conduct any polls of his own. In effect, the government was given a head start in knowing the attitudes of persons who would sit as jurors in this matter, especially when the government knew from the poll results that ninety percent of those who knew about the case thought Judge Collins was guilty and ninety-five percent thought that co-defendant Ross was guilty. Appendix F, *infra*, Questions C3. and C4. and corresponding answers.

Additionally, in outright disregard of the presumption of innocence, the government was allowed to pick a jury and go to trial with the exclusive knowledge from the poll that almost two thirds of those answering believed a defendant had to prove himself innocent. It is noteworthy that ninety-seven percent of those polled answered this question in regard to the presumption of innocence. Appendix F, *infra*, Question B1. and corresponding answer.

There are two reasons why this Court should grant a writ of certiorari on this issue. First, the polling and subsequent secret and exclusive use of the poll by the government is a *res nova* issue that in and of itself amounts to a violation of due process under the Fifth Amendment to the Constitution. Second, the only case

law even analogous to this issue, *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963), supports the argument that failure to turn over the poll and its results was a violation of due process.

As noted to the Fifth Circuit, the defendant has searched but has been unable to find any case law dealing with the equity, much less constitutionality, of the government's secret and exclusive use of a poll to survey the attitude and mind-sets of potential jurors who may sit in trial of criminal defendants. Petitioner argues that this polling in and of itself is a denial of due process.

The government's pre-trial intrusion into the mind-sets of potential jurors amounts to trial by polling, a denial of due process. The government with its vast financial and investigative resources should not be able to pre-try a case to potential jurors to learn their biases and prejudices and lack of knowledge of the Constitution in order for the government to prey on such mindsets at trial. This is precisely what the government did in this case, denying Judge Collins due process.

The Fifth Circuit agreed with the trial court that the poll was a "red herring" and that the petitioner's due process rights were not violated. However, the Fifth Circuit relied on an inapposite case involving government investigators' misconduct to find no fundamental unfairness in this trial. *United States v. Collins*, 972 F.2d at 1399, citing *United States v. Nissen*, 928 F.2d 690, 692 (5th Cir. 1991). The unfairness that occurred in this case is more subtle and insidious than the alleged overt unfairness of government agents' lying in *Nissen*. Here the government knew that two-thirds of those answering the poll, or two-

thirds of those selected to sit on a jury, believed that a defendant had to prove himself innocent.[2]

The fact that the government was given exclusive possession and/or use of this poll[3] also violated Judge

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[2] The Fifth Circuit sidestepped this issue by saying the question regarding "proof of innocence" was a "trick" question, "as it did not ask those surveyed whether the accused are entitled to a presumption of innocence, but whether the accused must prove their innocence." *United States v. Collins*, 972 F.2d at 1399, note 21. Judge Collins argues that this is a distinction without a difference to lay persons and is nothing more than a legal fiction.

Interestingly enough, in the same footnote, the Fifth Circuit cites another question in the poll where seventy percent answered that they "disagreed somewhat" or "disagreed strongly" with the statement that a person is probably guilty of a crime charged when brought to trial by the government. The Fifth Circuit termed this "precisely the reverse of the response to the 'proof of innocence' " *Id.* However, this is Judge Collins' exact argument. The average lay person is not schooled enough in the intricacies of Fifth Amendment law to know, as the Fifth Circuit seems to believe, that the government's burden of proving guilt beyond a reasonable doubt is different from a person proving himself innocent.

[3] At the hearing on the Motion for New Trial in this matter, the government's pollster, Dr. John B. McConahay, of Duke University, testified that he transmitted the information in regard to the poll and poll results to the government and had a telephone conversation with one of the prosecutors. During that conversation, he presumed the prosecution circled the answers to certain questions, including the answers to the presumption of innocence questions and the percentage of persons who thought the defendants were guilty. Appendix F, *infra*, is a typographic reproduction of the poll and poll results but unfortunately can not show the prosecution's handwritten notations and circling of certain poll results, such as the circling of the cumulative percentage of 63.3% of those answering who thought a defendant had to prove himself innocent, or the 89.6%

Collins' due process rights in that he was denied the opportunity to make certain decisions based upon the information that the government had. For example he did not choose to move for a change of venue, much less consult with an expert pollster to assist in understanding the significance of the poll and an effective way to counteract it when selecting the jury. Indeed, had Judge Collins known of the poll results, he would have pushed harder for individual *voir dire* of potential jurors, such as the type testified to by defendant's expert at the hearing on the Motion for New Trial.

The Fifth Circuit found that *voir dire* was adequate because the venire members were asked whether they would be able to render a verdict solely on the evidence presented at trial and the law as described by the court and because they were also instructed that the government had the burden of proof to establish guilt beyond a reasonable doubt. *United States v. Collins*, 972 F.2d at 1399. However, as shown above, the poll results indicate the lack of sophistication and knowledge about Fifth Amendment rights rampant in the minds of jurors in the Eastern District of Louisiana.

The Fifth Circuit also agreed with the district court that the "adversarial system with its liberal discovery mechanisms does not permit a party to 'contrive' a conviction that is not based on the evidence." *Id.* at 1400. However, in this case the petitioner asserts that not only was the government able to form and fashion its evidence to fit the mind-sets of jurors but also he points to the prosecutor's improper comment during closing argument on Judge Collins' failure to testify as fitting tongue-and-

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of those answering who thought Judge Collins was guilty based upon the government's presentation of facts or the 94.8% who thought Ross was guilty.

groove with the belief that his conviction was contrived in accordance with the poll results. In essence, the prosecutor told the jury Judge Collins failed to prove himself innocent.

The most important decision affected by Judge Collins' lack of knowledge of the poll was his decision not to testify. Little did he know that potential jurors did not believe that if he did not testify, he could still be proved innocent.[4]

Additionally, the defendant was doubly prejudiced. After the trial court told the defense that the poll and its results were a "red herring" but also ordered defendants not to take any polls themselves, the defense blissfully proceeded into a fight thinking that it had no reason to dodge the blows. Putting aside the fact that the defense was prohibited by the trial court from conducting its own poll, when Judge Collins was reassured by the trial judge that the poll and its results were nothing more than a "red herring," the defense was not even inclined to poll anyone. Why do so if the trial court was accurate? However, the trial court denied the defense the same knowledge the government had for future use when it chose the jury and presented its case.

Neither Judge Collins nor his counsel are so naive as to believe that all citizens accept the constitutional principle that one need not prove himself innocent. However, it was staggering to see the statistical data in the Eastern District of Louisiana indicating an overwhelming disregard for constitutional rights. Because of this fact, the

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[4] The Fifth Circuit dismissed this claim by stating the poll did not "contain questions relating to the privilege against self incrimination." *Id.* at 1400, n. 26. Petitioner contends the question of whether a defendant has to prove himself innocent relates directly to the Fifth Amendment right not to have to testify and prove oneself innocent. This is another legal fiction the Fifth Circuit has created to bootstrap its decision. Note 2, *supra*.

defendant also argues that the poll results should have been turned over to him for the same principle that failing to turn over exculpatory information was found to be a violation in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963). It was a complete disregard of the principles for which *Brady* stands for the prosecutors, not to mention the judge, to sit silently while apparently almost 100% of the venire answered that they believed in constitutional principles at *voir dire* when the government and the judge knew from the government's poll that they did not. The judge also erred in not questioning prospective jurors individually regarding their beliefs on the presumption of innocence in view of the poll results.

"[O]ne touchstone of a fair trial is an impartial trier of fact – 'a jury capable and willing to decide the case solely on the evidence before it.' " *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 554, 104 S.Ct. 845, 849 (1984) (citation omitted). For the government and the trial court to proceed through this trial with the devastating knowledge that an overwhelming majority of potential jurors in the Eastern District of Louisiana did not believe in constitutional principles without sharing this knowledge with the defense mocks the concepts of due process and fair trial embodied in the Constitution.

B. THE FLAWED PROCEDURE USED BY THE TRIAL COURT AND THE GOVERNMENT'S DISCRIMINATORY USE OF PEREMPTORY CHALLENGES VIOLATED *BATSON V. KENTUCKY*

Judge Collins contends that this Court should grant a writ of certiorari because his equal protection rights under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986) and its progeny were violated. The procedure used by the trial court in addressing petitioner's *Batson* objections and the pretextual reasons given by the government for

using six of its eight peremptory challenges to strike black jurors form the basis for this contention.

Judge Collins initially was hamstrung by the trial court in objecting to the prosecutor's use of peremptory challenges because the trial court did not allow him to know who was being stricken by the government, even though Judge Collins objected to this process. Then, only after the venire was dismissed and the jury was sworn, were counsel on behalf of Judge Collins given the opportunity to object to the government's use of its peremptory challenges.[5] The court with no other argument or hearing on the matter simply reviewed its own notes and denied the motion. The district court also allowed the government to wait until two days after the trial had begun to put on the record its reasons for striking the six blacks peremptorily. Then the court did not rule on these objections until July 5, 1991, six days after the trial concluded. All of these actions are in direct violation of the procedure and substance contemplated by *Batson*.

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[5] The trial court did not allow the defendants to object until after it had dismissed the venire and seated the jury, unlike the Fifth Circuit's assessment of the facts. After the jury was chosen and while the jury was seated in the jury box, the district court asked if the jury was acceptable to the parties. Faced with the prospect of addressing the specific issue in front of the jury or doing so out of the presence of the jury, the defense stated that the jury was acceptable "subject to the matter we discussed with the court that we can put on the record later," *i.e.*, the objection to the trial court's method of allowing each side to strike the jurors. The trial court on its own accord, knowing that the defendants were going to raise *Batson* objections as the defense had stated a few minutes earlier, chose to dismiss the venire. The trial court did not do so at the invitation or acquiescence of the defendants. Thus, petitioner did not waive his right to create a record while the venire was present. The notations to the record for these facts are in Appendix J, *infra*.

Batson contemplates that in deciding if a defendant has carried his burden of persuasion of purposeful discrimination, the court "must undertake 'sensitive inquiry into such circumstantial and direct evidence of intent as may be available.' " *Id.* at 93, 106 S.Ct. at 1721. (Citation omitted.) Further, *Batson* reasoned that a defendant "may make a *prima facie* showing of purposeful racial discrimination in the selection of the [jury] by relying solely on the facts concerning its selection *in his case.*" *Id.* at 95, 106 S.Ct. at 1722. "In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances." *Id.* at 96, 106 S.Ct. at 1723. Once the defendant proves a *prima facie* case, the prosecutor "must articulate a neutral explanation related to the particular case to be tried," *Id.* at 98, 106 S.Ct. at 1724, *i.e.*, "the prosecutor must give a 'clear and reasonably specific, explanation of his 'legitimate reasons' for exercising the challenges." *Id.* (Citation omitted.)

The trial court here ignored the relevant circumstances, simply looking at his notes and dismissing not only Judge Collins' *Batson* objection but also the venire, examination of which could have proven the government's reasons for striking black jurors were not race neutral.

The Fifth Circuit rejected this argument, but Judge Collins contends that this Court should reject the Fifth Circuit's stance and adopt the holding in *United States v. Dawn*, 897 F.2d 1444 (8th Cir. 1990). That appeals court correctly noted that any defendant who requests a *prima facie* finding of purposeful discrimination is obligated to develop a record beyond numbers in support of the asserted violation. *Id.* at 1448. At that point, "the district court, before the venire is dismissed and the jury is sworn, must give the defendant a reasonable opportunity to do so. Such a record will allow the appellate court to review the findings at issue." *Id.* at 1448-1449. *See United States v. Grandison*, 721 F.Supp. 743, 746

(D.Md. 1988). *Dawn* envisions that the trial court retain the venire, not dismiss it in the face of or after *Batson* objections from the defendant.

The trial court's refusal to allow Judge Collins to develop such a record through examination of the venire violated *Batson*. The district court then compounded the error when it dismissed the defense's motion for a mistrial purely on its own notes when the government was asking the court to leave the record open so that it could "put our independent reasons on the record for those strikes." The trial court's duty under *Batson* should have been to hold a hearing immediately, recalling the venire and making the government put its independent reasons on the record then, not allowing the prosecution a two-day delay before presenting its reasons for striking jurors.[6] In that way, the *Batson* objections could have been probed properly through the examination of the venire and those challenged.[7]

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[6] The Fifth Circuit also stated that the defendants acquiesced in allowing this two-day delay. *United States v. Collins*, 972 F.2d at 1402. However, this could not be farther from the truth. The record shows that the trial court quickly cut off any further discussion on the *Batson* issue and moved on to other issues, asking "any other preliminary matters?" The defense also did not suggest a further delay when the government on the morning of June 19, 1991, requested to state its reasons for strikes. At that moment, the government stated that it would take fifteen minutes to put its matters on the record, and the defense stated that it also wanted to respond and would need time to do so. However, the jury was waiting outside in the courtroom. The trial court stated, "I hate to keep them waiting." When the defense indicated to the court that its response might take more than five minutes, the trial court made the decision not to have the government put its reasons on the record while the jury was waiting for the trial to begin. See Appendix J, *infra*.

[7] Before the Fifth Circuit, Judge Collins noted that the *Manual on Recurring Problems in Criminal Trials*, Federal Judicial

Judge Collins' *Batson* rights also were violated when the trial court accepted the government's pretextual reasons for challenges of prospective black jurors, without examination of those challenged.[8] For example, one of the reasons given by the government for challenging a juror was because the potential juror was sleeping. Yet, the trial court even noted that it never saw the stricken juror sleeping.

Another example of purposeful discrimination under pretext was the government's striking prospective juror No. 48, a teacher's aide, but not No. 23, a teacher. The government's reason for striking prospective juror No. 48

Center, 3rd Edition 1990, sets forth axiomatic procedures for handling potential *Batson* violations once the trial court observes that more than one potential juror of the same cognizable racial group as a defendant is challenged peremptorily by the government. The *Manual* indicates that one of the first *obligations* of the trial court is to disclose the challenges of each side to the other. Then, if defense counsel objects and sets forth a *prima facie* case of purposeful discrimination, the prosecution must *then* at that time, convince the court that its reasons for peremptorily challenging the particular juror was for a reason or reasons other than that the potential juror was of the same cognizable racial group as the defendant. *Manual on Recurring Problems in Criminal Trials*, Federal Judicial Center, 3rd Edition 1990 at 29-30. The Fifth Circuit brushed off this suggested procedure by stating "that the fact that the district court may not have followed the *Batson* procedure as published by certain practice manuals has no bearing on whether defendant's constitutional rights were violated." *United States v. Collins*, 972 F.2d at 1401, note 29. However, the *Manual on Recurring Problems in Criminal Trials* published by the Federal Judicial Center certainly is authoritative as to the proper procedure to protect *Batson* rights.

[8] Fifth Circuit law provides that once the government provides an explanation for peremptory challenges, there is only a review of discrimination *vel non*. *United States v. Forbes*, 816 F.2d 1006, 1010 (5th Cir. 1987).

was that she would be too sympathetic because she helped teach speech therapy. Besides the fact that this reason was not given until two days after the trial began, prospective juror No. 23 also was a teacher who could have been just as sympathetic, given the government's reasoning, because he could teach poor, uneducated persons in a vocational-technical school. Prospective juror No. 48 was black; No. 23 was caucasian.

The most transparent and hurtful of the government's pretextual challenges related to the black juror who was an employee at Avondale Industries in New Orleans. At the time he filled out the jury questionnaire he listed his occupation as being "unemployed" but apparently secured a job at Avondale Shipyards during the interim. When asked what his occupation at the time of voir dire, he responded that he worked as a laborer for Avondale. Government counsel from Washington, D.C., stated that they sought and received the assistance of the local United States Attorney's Office to help them screen jurors with potential conflicts. They explained to the trial court that they were advised by an Assistant United States Attorney that there was a ongoing criminal investigation regarding illegal activities at Avondale and that because of that investigation they feared that the juror might maintain ill will against the government.

This is absolute rubbish. The Avondale prosecutions took place years ago. Not only had Judge Collins handled some of these prosecutions while sitting as a judge, but also two members of his defense team had represented Avondale executives who had been charged. The last prosecutions were over three years ago, and one of the defense team represented a defendant named Paul L. Tregre, Jr. in one of the last Avondale cases. Defendant

Tregre pleaded *nolo contendere* to four counts of the original indictment on July 9, 1987, and a judgment of conviction was entered on September 30, 1987, in *United States v. Paul Tregre*, 87-220, Eastern District of Louisiana. As one of the last prosecutions, this was almost four years before the trial of this case. To suggest that there was an ongoing investigation was an outright misrepresentation.

However, even assuming that there was an ongoing investigation, the former investigation only involved executives who were receiving kickbacks from suppliers and contractors who did business with the shipyard. There certainly is no reason to believe that an average hourly worker at Avondale who had just secured a job prior to the trial could have any hard feelings against the federal government. To the contrary, Avondale Industries is owned by the employees, and the rank and file workers would applaud prosecution of executives whose illegal acts undermined the work of the company. There certainly would be no reason to expect that a recently hired laborer would have any concern about an investigation that ended almost four years before he was even hired or an investigation of higher-ups presently.[9]

The Fifth Circuit found that the reasons given by the government were race neutral on their face and the district court found that they were not a pretext for discrimination. Thus, the Fifth Circuit found no error in their

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[9] The government requested no *voir dire* of this prospective juror. If the prosecution seriously was concerned about this juror's being prejudiced against the government, it certainly would seem that the government would have wanted to have question him on that point. It did not. The reason is because government counsel knew that this was a bogus issue. The pretext would have become obvious upon questioning, as would have been the racially motivated challenge.

conclusion. *United States v. Collins*, 972 F.2d at 1403. However, once again, Judge Collins points out that because of the flawed procedure, the defense was not allowed to explore these reasons.

This underscores why this Honorable Court should grant this writ of certiorari: to establish as set forth in *Dawn* a clear procedure as to how trial courts should deal with *Batson* objections, specifically ordering trial courts not to dismiss venires pending *Batson* objections that show a *prima facie* case of discrimination and/or the offering of explanations for peremptory challenges by the government.

C. PROSECUTOR IMPERMISSIBLY COMMENTED ON JUDGE COLLINS' FAILURE TO TESTIFY AT TRIAL OR HIS PRE-ARREST SILENCE

During closing argument, while pointing directly at Judge Collins and raising his voice, the prosecuting attorney stated:

> There was already $16,000.00 in his chambers. He had already started spending it. *And he won't tell anybody what it's for. If it's a real estate deal, tell us.*
>
> He is a federal judge for 13 years. He signed search warrants himself for years. He's presided over these trials for years. Are you going to tell me that he is incapable *at that moment* if there is a reason, innocent, legitimate explanation, from saying let me tell you what it's all about? He knows how the system works. He knows that you can explain. (Emphasis added.)

This improper comment by government counsel in closing argument violated Judge Collins' constitutional rights in one of two ways. First, this statement was an improper comment on his failure to take the stand. Second, if this was not a comment on his failure to take the

stand, it was a comment on Judge Collins' failure to say anything during the search of his chambers, and thus an unconstitutional comment on his pre-arrest silence.

In regard to the first argument, as this Court well knows, the Fifth Amendment prohibits a prosecutor from commenting directly or indirectly on a defendant's failure to testify. *Griffin v. California*, 380 U.S. 609, 614, 615, 855 S.Ct. 1229, 1232-1233 (1965). Under the law of the Fifth Circuit, "comment on a defendant's silence is reason for reversal only if the speaker's manifest intention is to focus on that silence or the remark was such that a juror would naturally and necessarily take it as a comment on the defendant's failure to testify." *United States v. Garcia*, 655 F.2d 59, 64 (5th Cir. 1981). As to the first possibility, there can be no "equally plausible" explanation for the remark. *United States v. Carrodeguas*, 747 F.2d 1390, 1395 (11th Cir. 1984), *cert. denied*, 474 U.S. 816, 106 S.Ct. 60 (1985).

The record is unequivocal that the prosecutor was commenting on Judge Collins' failure to testify at the trial. Besides pointing directly to Judge Collins and raising his voice, the prosecutor spoke in the present tense, not the past, and to the audience then present, the jury, in stating, "if it's a real estate deal, *tell us*." His manifest intention was surely to comment and focus on the decision of Judge Collins not to take the witness stand. This intention is underscored by the government's own poll, which not only shows the prosecutor's intent to focus on Judge Collins' silence but also the natural effect on the jury. According to the poll results, almost two-thirds of those polled thought that a defendant had to prove his own innocence. Not only did the prosecution have this information but they even totalled and circled these percentages. *See* note 3, *supra*. The prosecutors intended to plant and nurture in the jury's collective mind the seed

that a defendant has to prove himself innocent with the statement by the prosecutor that Judge Collins must "tell us."

The Fifth Circuit accepted the district court's decision that the prosecutor was commenting on Judge Collins' failure to explain a legitimate real estate deal during the entire set of events on August 10th, including the ride in the FBI vehicle. *United States v. Collins*, 972 F.2d at 1408. According to the Fifth Circuit this was an "equally plausible" explanation. *Id.*

However, the statement made by the prosecutor during closing argument and the statement of the prosecutor in response to the motion for mistrial specifically shows that the government's explanation of the comment was Judge Collins' failure to tell anyone on the "scene." This "scene," in context, can only be the scene of the search in Judge Collins' chambers when $16,000.00 was found. It should also be noted that it was the district court which provided the unsolicited interpretation that the events referred to all of the events on August 10, including the ride in the FBI vehicle, not those on the scene in chambers. Appendix K, *infra*. Thus, the alternative explanation is not "equally plausible."[10]

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[10] The Fifth Circuit also held that if the prosecutor did comment on Judge Collins' failure to testify, it was plain beyond a reasonable doubt that, given the weight of the evidence, the jury would have returned a guilty verdict absent the remark. *See United States v. Kane*, 887 F.2d 568, 576 (5th Cir. 1989), *cert. denied*, 493 U.S. 1090, 110 S.Ct. 1159 (1990). However, Judge Collins asserts that the facts of the trial were not as cut and dried as the Fifth Circuit would have this Honorable Court believe. The record as a whole as described *supra*, including the testimony of all the witnesses, lent reasonable doubt on the guilt of Judge Collins.

Judge Collins also argues, alternatively, that if the prosecutor was commenting on his silence during the search of his chambers, that was an unconstitutional comment on his pre-arrest silence.[11] The Fifth Circuit did not reach this question, believing the prosecutor's comments were directed primarily toward Collins, affirmative statements denying business dealing with Ross. *United States v. Collins*, 972 F.2d at 1409. However, as explained above, Judge Collins asserts that this is the improper context of the comment.

There is no doubt that during the search of Judge Collins' chamber, Judge Collins refused to say anything. F.B.I. Agent Freddie Cleveland testified at trial that after Judge Collins asked at the beginning of the search of his chambers for the probable cause for the search and following Agent Cleveland's answer, "at that point he said that he thought it was best that he talk to an attorney and I said, 'fine, you are free to call one at any time.' "

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[11] The Fifth Circuit stated that Judge Collins argued that even if the prosecutor was referring to the events of August 10, including the events of the whole day, his remark constituted an impermissible comment on pre-arrest silence. This is *not* Judge Collins' argument. The argument is that the comment was an impermissible comment on Judge Collins' pre-arrest silence during the search of his chambers. The improper comment by the government can only be linked to the search of the chambers, which is how the prosecuting attorney explained the comment in referring to Judge Collins failing to tell anyone on the "scene" what the $16,000.00 in his credenza was for. As noted above, it was the trial court's unsolicited comment that expanded this explanation to the whole events of August 10, which is belied by the fact that the prosecutor referred only to the singular "scene," not to the ride in the F.B.I. car earlier that day. Appendix K, *infra*.

The issue of comment on pre-arrest silence of a non-testifying defendant has not been addressed by this Honorable Court. *Jenkins v. Anderson*, 447 U.S. 231, 100 S.Ct. 2124 (1980), note 2. The circuits also have given conflicting interpretations and/or holdings on this issue. While the Fifth Circuit has not addressed the issue directly, *see United States v. Cardenas Alvarado*, 806 F.2d 566, 572 (5th Cir. 1986), the Eight Circuit and the Seventh Circuit disagree. *See United States v. York*, 830 F.2d 885, 895-96 (8th Cir. 1987) (prosecutor may comment on the inconsistency between non-testifying defendant's pre-arrest silence and trial defense with cautionary instruction of jury), *cert. denied*, 484 U.S. 1074, 108 S.Ct. 1047 (1988); *but see United States ex rel Savory v. Lane*, 832 F.2d 1011, 1017-20 (7th Cir. 1987) (admission of evidence of non-testifying defendants, pre-arrest silence was error but harmless); *United States v. Davenport*, 929 F.2d 1169, 1174 (7th Cir. 1991) ("it violates the self-incrimination clause to allow into evidence testimony that the defendant refused to give a statement to the police when first approached by them," citing *Lane*), *cert. denied*, ___ U.S. ___, 112 S.Ct. 871 (1992).[12]

This Honorable Court should grant Judge Collins, writ of certiorari because the prosecutor in this case acted unconstitutionally in one of two ways: either he improperly commented on Judge Collins' failure to testify at trial or improperly commented on Judge Collins' pre-arrest silence.

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[12] *See also Fencl v. Abrahamson*, 628 F.Supp. 1379 (E.D. Wis. 1986), *affirmed*, 841 F.2d 760 (7th Cir. 1988); *United States v. Karo*, 637 F.2d 869, 876 (2nd Cir. 1981); *United States v. Blanton*, 730 F.2d 1425, 1433-1434 (11th Cir. 1984); *United States v. Harrold*, 796 F.2d 1275 (10th Cir. 1986).

D. PETITIONER'S SENTENCE WAS ILLEGAL BECAUSE IT WAS BASED UPON A NON-GUIDELINES OFFENSE OF A THIRD-PARTY

Finally, this Court should grant a writ of certiorari to address the unique issue of sentencing in this case. Judge Collins was sentenced under the United States Sentencing Guidelines but the trial court used a pre-guidelines crime as the underlying offense for the sentencing. To use a pre-guidelines offense as the "underlying offense" to calculate Judge Collins' base offense level is improper and a denial of his due process rights under the Constitution.

Gary Young's offense, a conviction for importing over 2,500 lbs. of marijuana, would have carried a base offense level of 32 under the Sentencing Guidelines. However, Gary Young's conviction and sentencing did not fall within the guidelines because it was a pre-guidelines offense. *United States v. Collins*, 972 F.2d at 1414. The government permitted Gary Young to plead to a pre-guidelines offense to set up the desired scenario,[13] even though at the time of Young's plea agreement there was absolutely no evidence of Judge Collins' willingness to participate in such a scheme.[14]

This created the unique[15] circumstance wherein Young gets the benefit of a pre-guidelines offense (Young

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[13] It is obvious that Young's "life of crime" included both pre- and post-guidelines offenses which were readily discoverable from government de-briefings and its other information.

[14] Ross had bragged about his contact with judges (both state and federal) but there was absolutely no mention of any prior dealings with or favors from Judge Collins. Additionally, at the trial absolutely no evidence of any prior misconduct by Judge Collins with Ross or anyone else was introduced.

[15] "Unique" can hardly describe the situation here. If Young's offense had actually been a guidelines offense, then any reduction of sentence would have been virtually impossible without government acquiescence under U.S.S.G. Section 5K1.1.

received 36 months and expects a further reduction with his pending motion under Rule 35, Federal Rules of Criminal Procedure) and Judge Collins gets penalized for the fiction of Young's crime being treated *as if* it had been actually a guidelines offense.

As a result, using Gary Young's pre-guideline offense as the underlying offense, Judge Collins' base offense level was 26. U.S.S.G. Section 2C1.1(c)(1). However, the guidelines alternatively establish a base offense level of ten for receiving a bribe, permitting an eight-level enhancement if the offense includes a payment for the purpose of influencing a high-level, decision-making official. *U.S.S.G. Section 2C1.1(a) and 2C1.1(b)(2)(B).*

The Fifth Circuit upheld the sentencing, citing *United States v. Parks*, 924 F.2d 68, 72 (5th Cir. 1981). This reliance is misplaced. *Parks* states that "pre-guideline conduct [of the defendant being sentenced] may be considered in arriving at the guideline offense level. The guidelines state that in determining the seriousness of an offense, all conduct, circumstances and injuries relevant to the offense of conviction [of the defendant being sentenced] shall be taken into account." *Id.* Yet, the Fifth Circuit acknowledged that "all of the defendants, conduct occurred after the guidelines were in place." *United States v. Collins*, 972 F.2d at 1414. This contradiction is precisely Judge Collins' argument that due process was violated. *Cf. United States v. O'Campo*, No. 91-1089 (1st Cir. 1992), 51 Crim. L. Rep. 1554 (BNA) (relevant conduct for sentencing of conspirator does not include liability for substantive acts committed in furtherance of conspiracy prior to conspirator joining conspiracy).

The Fifth Circuit also cites *United States v. Willis*, 925 F.2d 359 (10th Cir. 1991) for the proposition that guideline penalties allow cross reference to state law violations. However, as the Tenth Circuit noted and as the Fifth

Circuit quoted, "the cross reference merely allows the sentence for the charged crime [that falls under the guidelines] . . . *to reflect the reality of the crime.*" *Id.* at 361. The reality of the crime certainly is not reflected where Judge Collins was sentenced to 82 months imprisonment but Young, who committed the underlying offense and whose base offense level would have been 6 levels higher than Judge Collins' level, was only sentenced to three years, imprisonment. This Honorable Court should grant this writ of certiorari on the sentencing issue to correct the due process violation.

CONCLUSION

Because this case involves important issues of constitutional law, including novel issues of due process and fair trial and conflicts among the circuits, petitioner submits that the Court should grant a writ of certiorari.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-3778

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

VERSUS

ROBERT F. COLLINS
and
JOHN H. ROSS,
Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Louisiana

(Filed Sep. 10, 1992)

Before KING, JOLLY, and SMITH, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Defendants Robert F. Collins, a United States District Judge of the Eastern District of Louisiana, and John H. Ross, Collins's longtime friend, challenge their convictions for bribery, conspiracy, and obstruction of justice. They also challenge the district court's calculation of their sentences. Finding no error, we affirm.

I.

In the summer of 1989, Gary Young was about to be indicted in the Eastern District of Louisiana for his role in a 1985 marihuana importation operation. Two of Young's coconspirators had been indicted, and Young feared that they would implicate him in the operation.

Young's attorney, Frank DeSalvo, informed him that his case would probably be assigned to Collins, as Collins had handled the cases of Young's coconspirators. At this time, Young asked DeSalvo to initiate plea negotiations with the government. He also considered using bribery as a means of solving his problems with the law.

In late August or early September of 1989, a business associate of Young's, John Yemelos, suggested that he contact Ross. Yemelos told Young that Ross might be able to help him bribe Collins. Young was already familiar with Ross, as he had had corrupt dealings with him in the past. On Yemelos's suggestion, Young called Ross in early September to arrange a meeting.

That meeting took place on September 14. Ross told Young that he was very close to Collins and could take care of the matter. Ross was concerned, however, that he had not received the money Young owed him from their last payoff deal – a scheme that involved Yemelos as well. In addition, Ross told Young that he would have to go through Yemelos if he wanted his help.

Young called Yemelos the next day and told him of his conversation with Ross. Young did not hear from Ross again for about two weeks. During this time, Young made

up his mind to cooperate with the government and to sign a plea agreement. DeSalvo already had met with federal authorities to discuss the possibility.

Young signed a plea agreement on September 27. At this point, the authorities expected Young to cooperate with regard to drug traffickers.

On September 28, Yemelos contacted Young to set up a meeting for later that day to discuss Ross. Young told DeSalvo that he had been contacted, and DeSalvo contacted the federal authorities. Special Agent Freddy Cleveland of the Federal Bureau of Investigation (FBI) then contacted Young.

Young told Cleveland that he had been contacted by Yemelos about Ross. He also told him about his prior corrupt dealings with Ross and about Ross's suggestion that he could help him with Collins. Young offered to tape his upcoming meeting with Yemelos, but Cleveland told him that he could not obtain permission to do so on such short notice. Young taped the meeting anyway, without Cleveland's knowledge.

At the meeting, Young asked Yemelos to arrange a meeting with Ross; Yemelos set up a meeting for the next day, September 29. For this meeting, the FBI fitted Young with a hidden recording device.

Young, Yemelos, and Ross met on September 29 in Yemelos's office. In a conversation out of the presence of Yemelos, Young and Ross struck a deal to bribe Collins. Ross confirmed that he could help Young if his case were assigned to Collins, stating that "I want to make sure that he's gonna have the case." Ross promised to "try not to

get you any jail time." In exchange, Young agreed to pay Ross $100,000. Ross asked for $5,000 right away and stated that Young could pay in installments, saying "we can start off with 2500." Young promised to get Ross $2,500 in the next week or so. He then paid Ross the $1,400 he owed from their last payoff deal and gave him $100 that was "extra."

Young paid Ross the initial $5,000 in three installments: $2,500 on October 11, $1,500 on October 19, and $1,000 on October 25.[1] Young and Ross also met on October 12, at which time Ross reminded Young that he could help him only if his case were assigned to Collins. Ross stated that "our arrangement is based upon getting it into his court" and that "I'm only committed to Collins."

After the October 12 meeting, the FBI referred the investigation to the Public Integrity Section of the Justice Department, as it involved potential wrongdoing by a federal judge. On November 30, the Public Integrity Section notified Fifth Circuit Chief Judge Charles Clark of the allegations against Collins. Chief Judge Clark then assigned Fifth Circuit Judge John M. Duhe to oversee the investigation.

Ross and Young met on January 22, 1990, to discuss the prospect of obtaining help from Collins. In a telephone conversation of February 1, Ross told Young that he had met with Collins on January 29 and that they had had "a nice chat." Ross stated that "I didn't, didn't discuss anything by name or anything like that, I just told

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[1] The money was provided by the FBI.

him that, ah . . . you know, there's a situation. And before it comes up we'll have lunch and all that business."

On March 16, the government activated pen registers and trap-and-trace devices on telephones located in Ross's office at the Regional Planning Commission ("RPC"), his private real estate office, and his home. These actions were authorized by Judge Duhé. On April 5, Young was indicted on three drug-related counts in the Eastern District of Louisiana pursuant to the September 27 plea agreement. The case was randomly assigned to Judge Patrick Carr. On April 25, Young met with Ross and showed him the indictment. Young told Ross that DeSalvo was preparing a motion to transfer the case to Collins. Ross again confirmed that getting the case to Collins was the critical part of the bargain, stating, "That's all I want to happen. That's all I want to know. That's all I want."

Ross also confirmed that he had mentioned the "situation" to Collins, who had told Ross to let him know when the matter would come up. Ross stated that once the transfer motion was filed, "I'm going to see Collins and tell him . . . to ask for the case . . . well what I mean by ask was, not to refuse to accept the case." Ross told Young that "as soon as you hear that Collins got the case you get on your knees and thank God."

On May 16, Young met with Ross and told him that DeSalvo and Assistant United States Attorney Albert Winters had scheduled a telephone conference call with Collins for the next day, May 17, to discuss whether Collins would accept Young's case. In Young's presence, Ross placed a call to Collins's chambers in New Orleans

and talked with his secretary. He asked her to let "Bob" know that he needed to see him the following day.

Later that day, Young again met with Ross and gave him $2,500.[2] Ross told Young, "I'm gonna take him to lunch, and I'm gonna work out some arrangements." Young told Ross that he would get Ross whatever he needed, and Ross responded that "you know what you had agreed to, so I'm working out of that."

The next day, May 17, Ross had lunch with Collins at Pete's Pub at the Hotel Intercontinental in New Orleans. After lunch, Ross called Young and told him that he had had a two-hour lunch with their "friend" who "gave me his direct number so I can call him . . . later on this afternoon . . . after he's had a discussion with a few people on the telephone."

At 5:36 p.m. later that same day, Collins, DeSalvo, and Winters conducted the scheduled conference call, during which Collins agreed to take Young's case. At 5:47 p.m., Ross placed a call to Collins, using Collins's private chambers line for the first time. Immediately thereafter, Ross called Young to tell him that Collins had accepted his case.

On May 18, Ross told Young that he had made some commitments based upon what Young had told him previously. Referring to Collins, Ross said, "He wants at least 50 percent before . . . you know, 50 now and 50 after he does what he's going to do." Ross added, "Let me tell you what I'm doing with him. I'm working on a 50-50,

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[2] This money also was provided by the FBI.

see. So that every time you give me, if you give me this, I'm giving him half." Young stated that he could have $20,000 by the following Wednesday, May 23. Ross replied, "Okay. Cause I'm gonna call him and tell him what he can expect." Immediately thereafter, Ross placed a call to Collins's chambers.

At this point, Judge Duhé granted the government's application to place a wiretap on Ross's private office and home telephone lines. The wiretaps became operational on those lines on May 21 and May 22, respectively.

On May 23, Young met Ross in his RPC office and gave him $20,000 in prerecorded bills; they agreed that Young would pay another $30,000 the following Wednesday, May 30. Soon after Young left Ross's office, Ross dialed Collins's private chambers number six times in two hours. When he finally reached Collins, he said he needed to see him to "talk about the property," adding, "I have an estimate for you." Collins replied, "Oh yeah. Okay, when?" They agreed they would talk again later in order to arrange a meeting.

A couple of hours later, Ross called Collins again. Collins suggested that they meet at Pete's Pub to have a drink. Ross replied, "Uh, I don't have no problem with that, uh, I need, I uh, would I be able, to de-, deliver those estimates to you?" Collins replied, "Yeah . . . Yeah, I'm sure."

About ten minutes later, the two met at Pete's Pub. Ross was carrying a brown folder, which Ross placed between them on the table. They talked for about one-half hour; neither touched the folder. When they got up to leave, Collins took the folder with him.

Ross and Young met the next day, May 24, at which time Ross described his meeting with Collins "over in Pete's Pub last night." Ross said that Collins wanted Young to get letters from people who would say favorable things about Young; these would "justif[y] his action" in sentencing Young. Ross also told Young that Collins wanted him to act "scared to death" at his plea hearing. He added that Collins warned Young to "keep his mouth closed," as a light sentence could look suspicious. He stated that "Collins might even be scrutinized about it." Finally, Ross added that Collins did not want anyone to know that "there was any cash involved."

On that same day, Ross leased an anonymous safe deposit box at the Security Center, a private commercial storage facility that rents both anonymous and named boxes. On May 30, Young gave Ross $30,000 in prerecorded bills; soon thereafter, Ross went to the Security Center. That same day, Young appeared in court before Collins and pleaded guilty to two counts of the indictment. Collins set Young's sentencing for August 8.

That afternoon, Young told Ross that he had thought he was to be sentenced before Collins went on vacation in July and asked Ross to find out why that had not occurred. Later that day, Ross called Collins on his private line and told him that he had thought he was going "to try to dispose of that property before going on [his] vacation." Collins stated, "No, I don't think I could . . . work it out," adding that he needed to talk to Ross. Ross told Collins, "I hope there's no problems with the property." Collins responded, "No, I don't think so," but added, "I don't know."

The next day, May 31, the New Orleans *Times-Picayune* ran an article that described Young's plea. Also on that day, the government received authorization to install a pen register and trap-and-trace device on Collins's private chambers line; on June 1, the government received permission to place a wiretap on that line.

On May 31, Ross and Collins met in the lobby of the Hotel Intercontinental, where they talked for about an hour. On June 4, Ross told Young that Collins did not like the article because it mentioned how much time Young had served for a previous offense, and Collins thought this would make it more difficult to be lenient. Ross assured Young that Collins was "just expressing a few concerns." On June 8, Ross again brought up Collins's reservations about the article. Ross stated that the article meant that Collins "has to look at his tactics and, and strategies a lot differently." In this context, Ross told Young that Collins wanted to see a letter from the United States Attorney's office recommending leniency for Young. There was no known contact between Ross and Collins from May 31 to August 6.

The United States Probation Office prepared Young's presentence investigation report ("PSI"), a confidential document, the first week of August. The PSI recommended eight years' imprisonment, noting Young's prior conviction and forty-month sentence. This recommendation section is intended to be seen only by the sentencing judge. The PSI also contained details of Young's personal and financial affairs.

On August 6, Ross called Collins on the private line, saying he had an "upper estimate on the balance" in

connection with the "act of sale" he had been "trying to get passed" for Collins. Ross told Collins that "if my figures are right," the balance was "around ten." Collins responded, "Yeah." The two agreed to meet for lunch the next day to "go over the figures again." Ross told Collins that he would bring "that information" with him so Collins could look at it.

A few minutes later, Ross called Young and said he was going to "meet my friend for lunch tomorrow. . . . So I need to see you before then." Ross also stated that "I'm supposed to take certain information to him tomorrow. . . . So he can review it."

The next day, Young met Ross at about 11:30 a.m. Ross asked whether he had brought the money; Young said that he had not. Ross said, "I was trying to tell you yesterday evening that's what to do. That's why I go a meeting with him today – to take him the money." Young told Ross that he had agreed to make the final payment after sentencing and asked why the plan had changed. Ross said, "I guess he wanted to make sure that he got his money." Ross asked Young whether he could get "at least 10" immediately; Young said he could, and left.

Young returned at about 12:30 p.m. with $11,000 in prerecorded bills in a brown folder. After Young left, Ross called Collins and told him, "I just had to wait to get something." The two met shortly thereafter at the St. Charles Restaurant. Ross arrived carrying the brown folder; Collins left with it.

Ross and Young spoke on the phone later that evening and discussed Ross's meeting with Collins. Ross revealed to Young several details from Young's PSI that

Collins had revealed to Ross. Ross referred to "a certain part of the report that you don't get . . . that's confidential" and told Young that the report recommended an eight-year sentence. Ross told Young that this recommendation was "cramping [Collins's] style" and that "he's got to be able to do something to justify this." Ross stated that Collins could not go below his forty-month previous sentence without a letter from the United States Attorney's office.

At around 5:00 p.m. that day, Collins called Winters, asking where Young's "letter of cooperation" was; Winters told him there would be no letter because Young had not cooperated.[3] Collins pressed Winters on the matter; Winters repeated that no letter was forthcoming. Winters testified that it was highly unusual for the sentencing judge to contact him in this manner prior to sentencing, stating that it had never happened to him during eighteen years as a prosecutor.

On August 8, Collins sentenced Young to forty-two months' imprisonment, less than half the PSI-recommended sentence. Ross called Young later that day and told him that Collins had said, "If I had done anything else . . . I would've been investigated because I, I can't justify giving you less time than you had the last, the first time . . . unless the U.S. Attorney's office ask[s] for lenience." Ross then added that Collins had said that without the letter of cooperation, "all I could do right

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[3] Specifically, Winters told Collins that Young was not able to "cooperate" with law enforcement officials because all of the "subjects" of his cooperation had already been convicted; thus, any "cooperation" he could offer would be of no value.

then was . . . add two months . . . to the first sentence, 'cause no way in hell I could justify . . . giving you less time your second time than the first time." Ross told Young that they had "saved" him five years already and that he would "start tomorrow trying to see what else we can do" to get the sentence reduced.

The following day, Young and Ross met and discussed the contents of the PSI. Ross said, "He was supposed to give you eight years man," and "he deviated from the recommendation substantially." Ross then said, "The Judge then told me, John, I did the very best I could without getting myself and you and everybody else in trouble." According to Ross, Collins had stated that he added two months to Young's previous sentence "to make it seem like I'm doing a legitimate thing." Ross then stated that Collins had "earned his money. . . . You got a good deal."

Young told Ross that DeSalvo had mentioned filing a motion to reduce his sentence. Ross said that he would check with Collins about it and added, "I believe I can get him to say yeah, I'll do a [Fed. R. Crim. P. 35], just give me the justification."[4] Ross then stated, "I wanna keep this Judge happy" and reminded Young that he still had to come up with the balance remaining on their $100,000 agreement. He said, "if [Collins] can make it easier for you there, he can also do something to probably make it

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[4] For offenses committed prior to November 1, 1987, Fed. R. Crim. P. 35(b) provided that "[a] motion to reduce a sentence may be made, or the court may reduce a sentence without motion, within 120 days after the sentence is imposed or probation is revoked. . . . "

harder on you." Ross stated that "the money part is thirty-one five" and told Young, "Try to have it tomorrow. Let's keep him happy," so that "when I go talk to him, I can have it."

The following day, August 10, Young met with Ross briefly in his RPC office and gave him $31,500 in prerecorded bills. Ross then called Collins's private chambers line and asked whether he could come over and "rap . . . a little bit." Collins agreed. Ross met with Collins that day at about 11:00 a.m. After the meeting, Ross gave Young specific instructions from Collins as to how to proceed with regard to reducing his sentence.

That afternoon, the FBI executed search warrants of Ross's person and his RPC office, real estate office, and box at the Security Center and search warrants of Collins's person, his car, and his private office in his chambers. These search warrants had been issued by Judge Duhé and Chief Judge Clark.

The sequence of events was as follows:[5] The FBI had hoped to serve the warrants on Collins in his chambers. When he left unexpectedly, the agents followed his car and stopped him at the first red light about two blocks from the courthouse. One of the agents approached the driver's side, identified himself as an FBI agent, and instructed Collins to exit the vehicle. Another agent told

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[5] Collins complains that the facts surrounding the execution of the search warrants were "sanitized" in the FBI reports; he also complains that the district court's hearing on the suppression motion somehow was inadequate. Collins makes no legal arguments addressing these matters; thus, we find that he does not raise them as issues on appeal.

Collins that they had search warrants for his person and his car. Collins asked the agents "[w]hat was this about," and they responded that he would find out in a few moments. The agents then moved the car to the curb.

Cleveland arrived shortly thereafter and identified himself as an FBI agent, telling Collins that he was not under arrest and that the agents could execute the warrants on the street or could move to a more private location. Collins said he would prefer to return to his chambers for the search of his person.

Cleveland stated that the search of the car could be conducted on the street or at the courthouse; Collins responded that neither place would be appropriate. Cleveland then suggested that the car could be taken to the FBI garage and searched; Collins agreed to this arrangement. Cleveland told Collins that the FBI agents would transport him back to the courthouse. Collins collected his coat from his car and got into the back seat of the FBI vehicle.

On the way to the courthouse, Cleveland identified himself by name. Collins asked what the search was about. Cleveland informed him that there were allegations that he had taken monies in relation to Young's sentencing. When Cleveland mentioned Ross, Collins said that Ross was an old friend who had called him with regard to Young in order to let Collins know that Young was a good person. Collins stated that this sort of a call to a sentencing judge was not unusual. Collins also claimed he had accepted no money from Ross with regard to Young or for any other reason and that he had no business dealings with Ross.

When they arrived at the courthouse, Cleveland and Collins went to his chambers. Collins asked Cleveland what the probable cause was for the search. Cleveland stated that federal agents had seen him meeting with Ross and that communications between them had been intercepted. Collins then said he would like to consult an attorney, and all questioning stopped; Cleveland told him he was free to leave.

Before Collins left, Cleveland served him with a subpoena directing him to produce documents concerning any financial dealings with Ross. Collins read aloud the subpoena requests, then stated that he had no records of financial dealings with Ross because he had had no such dealings with Ross. Cleveland also asked Collins to empty his pockets; in Collins's wallet, the agents discovered $180 of the May 23 payment.

When the agents executed the search warrant of the chambers, they discovered $16,000 in cash in a credenza: $6,000 from the May 23 payment and $10,000 from the August 7 payment. After giving Collins a receipt for the monies they seized, the agents left.

On the same day, two FBI agents went to Ross's RPC office to interview him and to execute the search warrants of his office. When they arrived, they identified themselves as FBI agents to the receptionist and asked to see Ross. The receptionist went to the back of the office. When she returned, she told the agents that Ross was on the telephone and would be with them shortly. The agents waited for about five minutes, then asked to see Ross immediately. The receptionist guided the agents down the hallway, where they met Ross.

Once in Ross's office, the agents informed Ross that they needed to speak with him about allegations of attempted bribery of Collins. The agents told Ross he was not under arrest. The agents asked whether he had any recent financial dealings with Collins; he said he had none. The agents then informed Ross that they had evidence, including tape recordings, that Young had worked through him to obtain a low sentence from Collins and that Young had given him large sums of cash.

Ross stated that he had contacted Collins with regard to Young but denied ever having received large sums of cash from Young or having given large sums of cash to Collins. The agents also advised Ross that he could be charged with a number of felonies based upon the evidence. They then showed Ross a number of photographs of his meetings with Collins.

When Ross stated that he wanted to see an attorney, the agents stopped questioning him[6] and produced, for his inspection, the search warrant for his office. Ross then stated, without being asked a question, that he did not understand what was going on and said that Young must have set him up. The agents again stated that they had tape recordings of incriminating conversations. They then reminded him that he had asked for an attorney and that

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[6] Ross argues that the agents continued to question him for another 15 minutes. This dispute is not relevant to our decision, as Ross does not seek, on appeal, the suppression of statements he made after invoking his right to counsel; instead, he argues he was in "custody" during the entire encounter with the agents. *See infra* part VII.

therefore he should refrain from making any more statements.

One of the agents asked Ross to remain in the office while they executed the search warrant; Ross stated that he would rather leave. The agents again stated that he was not under arrest and told him he was free to go. Before he left, he was served with a subpoena requesting certain documents; Ross told the agents that he had no such documents. Ross then was served with a search warrant for his person; when the agents conducted the search, they found $940 of the August 7 payment in his pocket.

When the agents told Ross that they needed someone to remain with them in the office while they conducted the search, Ross called in the receptionist and left soon thereafter. During the search, the agents discovered the full $31,500 payment from earlier that day. The FBI also searched Ross's Security Center box, in which they found $9,380 from the May 23 payment and the full $30,000 of the May 30 payment.[7]

II.

Collins and Ross were indicted for bribery in violation of 18 U.S.C. §§ 2 and 201(b)(2), obstruction of justice in violation of *id.* §§ 2 and 1503, and conspiracy to defraud the United States in violation of *id.* § 371. At trial,

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[7] In sum, the agents recovered the following: $15,560 of the $20,000 May 23 payment; the full $30,000 of the May 30 payment; $10,940 of the $11,000 August 7 payment; and the full $31,500 of the August 10 payment.

Ross testified that he had received money from Young and had given money to Collins. He claimed that Yemelos had instructed him to accept $100,000 from Young in order to start a legitimate minority business enterprise called "Mahogany, Inc." Ross also testified that he had given Collins the $16,000 found in Collins's chambers as a downpayment on a piece of property that was to be used by Mahogany, Inc. Collins did not testify.

The jury found both defendants guilty. Ross was sentenced to eighty-eight months' imprisonment and Collins to eighty-two months' imprisonment.

III.

Prior to trial, Collins and Ross filed a motion to dismiss their indictment based upon alleged prosecutorial misconduct. After a hearing, the district court denied the motion.

The defendants' prosecutorial misconduct argument breaks down into three separate issues. First, Collins focuses on the initiation of the investigation, arguing that federal law enforcement officials must have reasoned suspicion that criminal activity is occurring before they can target a federal judge for investigation. Second, both Ross and Collins contend that, taken as a whole, the investigation was so outrageous as to constitute a due process violation. Finally, Ross and Collins argue that they were singled out for prosecution because they are black.

A.

Collins asserts that, because of separation-of-powers considerations, federal judges have "a right to be left

alone absent some reasonable suspicion on the part of the Executive Branch of government to believe that some offense has been committed." We recently rejected the proposition that the government "should have reasonable suspicion that an individual is involved in some illegality before targeting him in a sting operation." *United State v. Allibhai*, 939 F.2d 244, 249 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 967 (1992).

Collins provides no authority for carving out a "federal judge exception" to *Allibhai*'s general rule,[8] and we decline to create one. As we noted in *Allibhai*,

> As a practical matter, investigative agencies rarely expend their limited manpower and resources on a mere whim or in fabrication criminal activity. In circumstances in which an investigation unfortunately ensnares a non-predisposed individual, the defense of entrapment serves as an effective bar to conviction.

Id. This reasoning would apply to federal judges and ordinary persons alike. In addition, judges, like other citizens, are protected against vindictive prosecution. *See Hastings*, 681 F.2d at 711.

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[8] At least two circuits have held, however, that separation-of-powers concerns do not justify immunizing federal judges from criminal prosecution as a general matter. *See United States v. Hastings*, 681 F.2d 706, 710-11 (11th Cir. 1982), *cert. denied*, 459 U.S. 1203 (1983) (rejecting defendant's argument that separation-of-powers concerns should prevent executive officers from prosecuting federal judges for acts involving exercise of their judicial power); *United States v. Claiborne*, 727 F.2d 842, 847-48 (9th Cir.) (same), *cert. denied*, 469 U.S. 829 (1984).

Moreover, and perhaps most importantly, a "federal judge exception" would go against the fundamental principle that "[a] judge no less than any other man is subject to the processes of the criminal law." *Id.* In sum, we reject Collins's suggestion that we adopt a federal judge exception to the *Allibhai* rule.[9]

B.

Both defendants argue that the investigative activity of federal law enforcement officials was so extreme as to constitute a due process violation. They point to the Supreme Court's *dictum* that it might "some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." *United States v. Russell,* 411 U.S. 423, 431-32 (1973) (citation omitted). *See also Hampton v. United States,* 425 U.S. 484, 489 (1976) (restating *Russell dictum.*)

We have acknowledge the *Russell-Hampton*-type theory of a due process violation but apparently have never invalidated a conviction on this ground.[10] As we repeatedly have held, "a due process violation will be found

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[9] Because we do not adopt such an exception, we need not consider the government's argument that, assuming *arguendo* that "reasoned suspicion" is required, such suspicion existed in this case.

[10] In fact, there appears to be only one circuit court case, *United States v. Twigg,* 588 F.2d 373 (3d Cir. 1978), in which a conviction was invalidated on *Russell-Hampton*-type grounds. We have distinguished *Twigg* on the ground that in that case, the government devised and ran the criminal enterprise with only

only in the rarest and most outrageous [of] circumstances." *United States v. Nissen*, 928 F.2d 690, 693 (5th Cir. 1991).

The defendants contend that the government acted outrageously because it "align[ed]" itself with Young, "an individual who is obviously and purposefully intent on seeking out members of the black race so he could benefit himself by creating federal prosecutions against them." The defendants point to the taped conversations between Young and Yemelos in which Young repeatedly used a racial slur in reference to Ross and Collins. Young also suggested to Yemelos that given that Ross and Collins were black, "they" could talk to each other.

Although we certainly do not condone Young's language, we can find no due process violation here. The defendants cite no authority for the proposition that the due process clause forbids the government from using individuals of questionable character as informants. To the contrary, it is a common practice accepted by courts.[11]

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meager assistance from the defendants. *See e.g., United States v. Tobias*, 662 F.2d 381, 386 (5th Cir. Unit B Nov. 1981), *cert. denied*, 457 U.S. 1108 (1982); *United States v. Gray*, 626 F.2d 494, 498-99 (5th Cir.), *cert. denied*, 449 U.S. 1038 (1980). We also have stated that "[a]llegations of outrageous government conduct are . . . unavailing where the defendant . . . actively and willingly participat[ed] in the criminal conduct leading to his arrest." *United States v. Nissen*, 928 F.2d 690, 693 (5th Cir. 1991). Because Collins's and Ross's participation in the criminal activity was "active" and "willing," we find *Twigg* inapposite.

[11] *See United States v. Reynoso-Ulloa*, 548 F.2d 1329, 1338-39 (9th Cir. 1977) (not outrageous for government to employ informant who uses vulgar and threatening language while

Moreover, as the government argues convincingly, individuals of questionable character oftentimes make the best informants, as their willingness to engage in criminal activities must be convincing to the other participants. Taken in this context, the defendants' due process rights were not violated by the government's association with Young.

C.

Finally, the defendants contend that the government singled them out for investigation because they are black. The burden on a defendant to show selective prosecution is a heavy one, *see United States v. Ramirez*, 765 F.2d 438, 439 (5th Cir. 1985), *cert. denied*, 474 U.S. 1063 (1986), as he must meet two requirements. First, he must make *prima facie* showing that he has been singled out for prosecution although others "similarly situated who have committed the same acts have not been prosecuted." *Id.* at 440 (citations omitted). He then must demonstrate that the government's selective prosecution of him was "actuated by constitutionally impermissible motives . . . such as racial . . . discrimination." *Id.* (citations omitted). A showing of discriminatory purpose requires the defendant to demonstrate that the government selected or reaffirmed a particular course of action at least in part "because of" – not merely "in spite of" – its adverse effects on an identifiable group. *Id.*

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making drug deals), *cert. denied*, 436 U.S. 926 (1978); *United States v. Myers*, 692 F.2d 823, 846 (2d Cir. 1982) (no due process violation where government used "dishonest and deceitful" informant), *cert. denied*, 461 U.S. 961 (1983).

At a pretrial hearing, the defendants called Joseph Mohwish to testify. Young's attorney, Frank DeSalvo, had represented Mohwish in a criminal proceeding in Kentucky in April 1990.[12] Mohwish was involved in "set[ting] up" a black politician and that he would receive a sentence of eighteen to twenty-four months because of his cooperation. Mohwish also testified that DeSalvo told him he could get a better "deal" if he could "set up a drug dealer or a black politician." Then, according to Mohwish, DeSalvo laughed and said, "Yeah, the government has got them on an endangered species list."[13]

The district court found that Mohwish was not a credible witness.[14] The defendants contend that we should find Mohwish credible because he "had nothing to gain from his testimony." This is not sufficient to overcome the strong deference we give to the credibility decisions of a district court. *See, e.g., United States v. Caldwell,* 820 F.2d 1395, 1401 n.5 (5th Cir. 1987); *United States v. Pologruto,* 914 F.2d 67, 70 (5th Cir. 1990). We therefore do not disturb the district court's determination.

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[12] Mohwish was convicted and is now serving a lengthy prison term in Atlanta for participating in a continuing criminal enterprise. He also has a previous conviction for mail fraud.

[13] Mohwish gave substantially similar testimony at trial.

[14] Mohwish's testimony was contradicted by that of the federal agents, who testified in detail as to how the investigation had proceeded. DeSalvo denied ever having discussed Young's case with Mohwish, although the court found that his testimony "also raise[d] credibility issues," as he "exhibited uncertainty in some answers and appeared to be eluding others."

Moreover, the defendants would fall short of meeting their burden even if Mohwish's testimony were to be believed. His testimony traces nothing specific in nature back to the prosecution, as distinguished from DeSalvo. DeSalvo might have thought that Young was "setting up" Collins by "cooperating" with the authorities, but this is not evidence of the intent of the federal authorities (the second *Ramirez* prong).[15] Similarly, nothing in Mohwish's testimony goes toward establishing that the United States Attorney's office was failing to prosecute individuals who had committed acts similar to those committed by Ross and Collins (the first *Ramirez* prong).[16] In sum, the defendants fail to meet their heavy burden of making out a *prima facie* case of selective prosecution.[17]

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[15] Besides Mohwish's testimony, the defendants return to Young's use of racial slurs. It is simply too far a stretch to argue that because Young made such slurs, the government's decision to investigate and prosecute Collins and Ross was racially motivated. Thus, this evidence, like the Mohwish testimony, does not fulfill the second *Ramirez* prong.

[16] The defendants cite a statistic that 14% of the public corruption cases in the last five years have been against black officials, who comprise only two percent of elected officials nationwide. Again, this evidence does not demonstrate that the government failed to prosecute similarly-situated individuals, and thus it does not satisfy the first *Ramirez* prong.

[17] The defendants also charge that the government's allegedly outrageous conduct continued throughout the trial; they essentially summarize their arguments pertaining to errors committed during trial and sentencing that are discussed *infra*. Because we find that none of those grounds for error is meritorious, we do not find an "outrageous" pattern of conduct.

IV.

Prior to trial, the prosecution commissioned a telephone survey of 457 persons in the Eastern District of Louisiana, asking them various questions relating to the upcoming trial. Among other things, the survey asked those polled whether they agreed with the general proposition that "[p]eople accused of a crime ought to have to prove they are innocent." Almost two-thirds of those who responded "somewhat" or "strongly" agreed. Then, after hearing a recitation of the prosecution's version of the evidence against the instant defendants,[18] those polled were asked whether they thought the defendants were "definitely guilty, probably guilty, probably not guilty, definitely not guilty or do you have no opinion in this

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[18] The recitation was as follows:

Judge Collins and John Ross are charged as part of an FBI sting operation in which a man charged with drug trafficking, Gary Young, gave $100,000 to Ross to get his friend Judge Collins to go easy in sentencing Young. The judge and Ross did not know that Young was working for the government. It is alleged that some of the money was used to bribe the judge and that both Judge Collins and Ross had money from Young in their possession when their offices were searched. Based upon what I have just told you or anything else you may have heard, seen or read about this case, do you think that Judge Robert Collins [and John Ross are] definitely guilty, probably guilty, probably not guilty, definitely not guilty or do you have no opinion in this case.

case." A large majority of those who responded thought they were definitely or probably guilty.[19]

The defendants found out about the survey and reported it to the district court, which in turn ordered the government to terminate all polling and turn over the poll and the results to the court. After reviewing the polling material, the court concluded that the poll was a "red herring" and that nothing had been done to compromise the integrity of jury selection. The court also ordered the defendants to refrain from taking a poll of their own.

In addition, the court refused to turn over the material to the defendants, noting that doing so "would raise issues that would unnecessarily complicate the proceedings." The court stated that it would not release the survey, as it was "concerned that if any details of the survey were publicized at that time, jury selection would be difficult because misunderstandings based upon the results of the poll could taint the entire panel." The court turned the polling materials over to the defendants after trial.

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[19] The district court described the results of this question as follows:

> Fifty-seven percent of those answering the survey knew of the Collins case. Of that 57%, ninety percent (50.8% of the total number surveyed) felt that Collins was probably or definitely guilty, with the vast majority in the "probably guilty" category. Ninety-five percent of those answering (55.6% of the total surveyed) believed that Ross was probably or definitely guilty, again with the vast majority of those in the "probably guilty" category.

In denying the defendants' motion for new trial, the district court held that the poll had not undermined the integrity of the jury. None of the jurors who served on the jury was contacted, and the court specifically inquired as to this matter in voir dire.[20]

The court also found that the poll results did not give the prosecution an unfair advantage in selecting a jury or preparing for trial and did not significantly prejudice the defendants. On appeal, the defendants focus exclusively on this aspect of the issue, arguing that the district court "missed the point in concentrating solely on the 'integrity of the jury.' "

We agree that the poll was a red herring and that the defendants' due process rights were not violated. In order to show a violation of due process, a defendant must show that the prosecution's conduct rendered his trial fundamentally unfair. *United States v. Nissen*, 928 F.2d 690, 692 (5th Cir. 1991). There was no such fundamental unfairness here.[21]

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[20] During voir dire, the court asked the venire the following question: "Has anyone talked to you about this case? In other words, has anybody called you on the telephone, anybody trying to poll any of you, make a telephone call to you, talk to you about the case, discuss the case with you in any way?" No one had been contacted by the polltakers.

[21] The questions and responses were not particularly useful to either side. The question regarding "proof of innocence" was a "trick" question, as it did not ask those surveyed whether the accused are entitled to a presumption of innocence, but rather whether the accused must prove their innocence.

In another question, when those surveyed were asked whether they agreed with the statement that "[w]hen the government brings a person to trial, he or she is probably guilty of

As for jury selection, the district court found that the prosecution was not able to take advantage of the survey to the detriment of the defendants. We agree. The court ordered the government not to compile or analyze the data. Thus, the government was prevented from compiling a "juror profile." Because the raw responses were worthless without the underlying demographic and background information, the government could not pick and choose among jurors based upon the survey information.

The defendants respond that had they known about the results, they would have "pushed harder" for individual voir dire of prospective jurors. They also argue that the district court should have conducted individual voir dire on its own accord. We reject these arguments.

The defendants have made no showing that voir dire was inadequate. The district court asked the veniremembers, as a panel, whether they would be able to render a verdict solely on the evidence presented at trial and the law as described by the court.[22] It also instructed the

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the crime charged," almost 70% "disagreed somewhat" or "disagreed strongly" – precisely the reverse of the response to the "proof of innocence" question.

With regard to the second question, it is important to note that those surveyed were asked to gauge the defendants' guilt or innocence after hearing the prosecution's theory of the case. It is not surprising that respondents would agree that the defendants were guilty, based only upon the prosecution's recitation of the evidence.

[22] The district court asked the following:

> If you are selected to sit on this case, will you be unable or unwilling to render a verdict solely on the evidence admitted in the trial and the law as I give it

panel that the government had the burden of proof to establish guilt beyond a reasonable doubt. Finally, the court asked several questions designed to discover whether any veniremembers had been influenced by the media or already had formed an opinion on the case.[23] The court found, and we agree, that the defendants had

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to you in the course of my instructions disregarding any other ideas, notions or beliefs about the law that you may have encountered in reaching your verdict?

[23] The court posed the following questions:

[D]o any of you recall having read anything about this case, the nature of the charges, any information about the case, read it in the newspapers, heard anything about it on television, anything that you recall having read or heard about the case? . . .

[Several prospective jurors responded.]

Those of you who have read something about the case, heard something about it on radio, on television, has anything occurred as a result of that that would prevent you from returning a verdict in this case based solely upon the evidence you hear in Court and the instructions I give to you?

In other words, have you made up your mind about it one way or another? Have you resolved any of the issues? Is there anything that would prevent you from deciding this case based solely upon the evidence you hear in court and the instructions I give you? . . .

[Several prospective jurors responded.]

Other than those who have just responded to the last question, do any of the members of the panel have an opinion as to the guilt or the innocence of any of the Defendants or the charges contained in the Indictment at this time or have you ever expressed an opinion as to the guilt or the innocence of any of the Defendants?

[There was no response from the panel.]

failed to make a showing that additional voir dire was needed.

The defendants seem to be contending that had they only known that the community from which the jury panel was drawn might have been biased against them, they would have been more aggressive in voir dire.[24] We can suppose, however, that a defense team usually enters the voir dire process with the assumption that some members of the venire are biased against the defendant and that the aim is to ferret out that bias. Access to the poll results merely would have reinforced this general assumption. We therefore find that being deprived of the poll results did not deprive the defendants of their due process rights in the voir dire process.[25]

The defendants also argue that the government had an unfair advantage at trial. Again, we disagree. As the district court noted,

> [A]lthough a survey of community attitudes may aid a party in deciding what to *emphasize* at trial, our adversarial system with its liberal discovery mechanisms[] does not permit a party to "contrive" a conviction that is not based on the

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[24] The defendants also argue that they would have requested a change of venue had they known of the poll results. As we have noted in the past, "[c]ourts have generally felt that voir dire examination is the appropriate mechanism for screening jurors to avoid bias," not change of venue. *United States v. Malmay*, 671 F.2d 869, 876 (5th Cir. 1982). Here, as we have noted, voir dire was adequate to ferret out any bias.

[25] From this it follows that the defendants were not deprived of due process by being unable to consult with an expert as to how to counteract the poll results during voir dire.

> evidence. There is no evidence that the Government manufactured or "tailored" evidence based on the survey.

The defendants respond that had they known about the poll results, they would have altered their trial strategy.[26]

Although the defendants might have found the results beneficial in trial preparation, the question is whether being deprived of the results deprived them of due process. They fail to point out how being deprived of the results significantly handicapped them in preparing for trial or conducting their defense. We therefore find no due process violation.[27]

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[26] The only specific decision the defendants identify is Collins's election not to testify. They argue that that decision was premised on the presumption that Collins's "right *not* to testify was intact." We fail to see how the survey, which did not contain questions relating to the privilege against self-incrimination, would have had any bearing on Collins's strategy in this regard.

[27] The defendants make two additional arguments that we find are without merit. First, they argue that the mere taking of the poll violated their due process rights. We decline to hold that all government-sponsored polls are *per se* unconstitutional; rather, we find that in this particular case, there was no constitutional violation.

They also argue that we should apply the "analogous" *Brady* doctrine to hold that the court should have ordered the government to give them access to the poll results. *Brady v. Maryland*, 373 U.S. 83 (1963), holds that suppression by the government of material exculpatory evidence is a violation of due process. But the poll results were "not evidence," *see Jones v. Butler*, 864 F.2d 348, 355 (5th Cir. 1988), *cert. denied*, 490 U.S. 1075 (1989), and thus the government was not under an obligation to disclose them.

V.

The defendants also raise a claim under *Batson v. Kentucky*, 476 U.S. 79 (1986), which prohibits the prosecution from using its peremptory challenges in a racially discriminatory manner. First, the challenge the procedure by which the parties were allowed to exercise their peremptories. Second, they argue that, contrary to the district court's finding, they met their burden of showing discrimination on the part of the prosecution.

A.

The defendants contend that the district court erred in dismissing the venire before they had an opportunity to create a *Batson* record and in allowing the prosecution to put its justifications for its strikes on the record two days after the jury was impaneled.

1.

Following voir dire, the court informed the parties that each side was to exercise its peremptories all at once and not in view of the other side. The defendants lodged the following objection:

> We want to note an objection to the Court's method of allowing each side to strike the jurors and the reason we do that is it relates to the *Batson* decision, Judge. We feel that when each side is required to exercise their challenges altogether without the other side seeing them and without the challenges being able to be evaluated vis-a-vis what the other ones are doing, we

> think [it] destroys part of our ability to make any meaningful *Batson* challenges.

The court stated that it saw "no need to challenge the method of selection." The court then called for a brief recess, and the two sides exercised their peremptories.

When court resumed, the jury was selected and seated in the jury box. The court asked each side whether the jury was acceptable. Collins's counsel stated that it was, "[s]ubject to the matters we discussed with the Court that we can put in the record later." Ross's counsel adopted Collins's counsel's statement. Thus, the defendants did not seek to create any further record, the jury was sworn in, and the venire was dismissed.[28]

The defendants now contend that they were not given an adequate opportunity to create a *Batson* record prior to the dismissal of the venire, citing *United States v. Dawn*, 897 F.2d 1444, 1448-49 (8th Cir.) ("the district court, before the venire is dismissed and the jury is sworn, must give the defendant a reasonable opportunity" to create a *Batson* record), *cert. denied*, 111 S. Ct. 389 (1990).[29] They

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[28] We note in passing that the jury that was finally chosen was approximately 25% black, representing roughly the percentage of blacks in the district.

[29] Although the defendants complain that they were "hamstrung by the trial court in objecting to the prosecutor's use of peremptory challenges because [they] did not know who was being stricken," they do not argue that the process in and of itself violated their *Batson* rights. Even if we were to consider this issue as properly preserved, however, it is without merit.

The defendants seem to suggest that the court, by requiring each side to exercise its peremptories all at once, prevented them from showing a "pattern" of discrimination. *See Batson*,

argue that additional voir dire would have enabled them to make out a *prima facie* case of discrimination and to carry their ultimate burden of showing discrimination. They explain that they failed to object because, "[f]aced with the prospect of addressing the specific issue in front of the jury or doing so out of the presence of the jury," the latter option was more appealing. According to the defendants, their choice "certainly was not an invitation to the trial court to dismiss the venire a few moments later," and they argue that the court should not have dismissed the jury "knowing that the defendants were going to raise a *Batson* objection."

We reject these arguments. The district court asked whether there were any further objections; there were none, and it dismissed the venire. A district court need not retain the venire when it has not been requested to do so. If the defendants did not wish to raise their *Batson* objections in front of the jury, they could have requested a bench conference or a brief recess. Moreover, the defendants failed to ask the court to recall the venire, even after they made their full *Batson* objection once the jury

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476 U.S. at 97 ("For example, a 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination."). We disagree. As discussed *infra*, the government provided justifications for its peremptories. It is these justifications that form the basis of a *Batson* challenge. That the government exercised its peremptories all at once would have no effect upon the defendants' ability to cast doubt on these explanations. We also note that the fact that the district court may not have followed the *Batson* procedure as established by certain practice manuals has no bearing on whether defendants' constitutional rights were violated.

and venire had been dismissed. Thus, they waived their right to create a record while the venire was present.[30]

2.

After the jury was seated and the venire had been dismissed, the defendants entered their *Batson* objection and moved for a mistrial.[31] At that point, the prosecution

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[30] The defendants also argue that their objection to the "blind" exercise of peremptories should be sufficient to constitute an objection to the dismissal of the venire. Although the "purpose" behind the first objection might have been to provide a *Batson* record, as would have been the purpose behind an objection to the dismissal of the venire, the fact remains that the second objection simply was not made.

In addition, as the government correctly suggests, it is difficult to see how additional questioning would have aided the defendants in making their case of discrimination. In determining whether the government discriminated against black potential jurors, the focus is on the responses the stricken jurors actually gave during voir dire, not on responses they might have given had they been asked additional questions.

[31] Collins's attorney stated the following:

> We note and the Court can, I believe, take judicial notice that the makeup of black to white jurors in the district is approximately 26 percent. It turned out that the makeup of the jury panel this morning was approximately 26 percent and interestingly enough, when various challenges for cause were granted by the Court, the remaining ratio of jurors black to white was approximately 26 percent, but yet out of the eight challenges which the Government was given, six of those challenges were for blacks, so three-quarters of the Government's challenges were devoted to black citizens and one-quarter of the citizens of the District and one-quarter of the jury venire in round figures

asked for leave of court to place its justifications for its peremptories in the record, presumably at some future date. The court agreed, and the defendants did not object. When the prosecution renewed its offer to place its justifications into the record two days later, Collins's attorney suggested that "[m]aybe we ought to do it at a different time." The matter eventually was taken care of later that day. The defendants now suggest that the two-day delay allowed the government to devise pretextual justifications for its peremptory strikes. But again, the defendants cannot now complain when they failed to object contemporaneously.

B.

Once a defendant makes out a *prima facie* case of discrimination, the burden shifts to the government to come forward with a race-neutral explanation for its challenges. *United States v. Hinojosa*, 958 F.2d 624, 632 (5th Cir. 1992). Although the district court found that the defendants had not established a *prima facie* case, it held a hearing at which the government set forth its reasons and at which the defendants were permitted to respond. After the hearing, the court held that the prosecution's justifications were race-neutral and not pretextual. In this

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were made up of blacks and we think that is a prima facie challenge under *Batson*, that the Government's selection of the Jury was in violation of the United States Constitution, and for that reason the Defense, on behalf of Robert Collins, moves for a mistrial.

Ross's attorney adopted the objection and motion, which the district court denied.

situation, where "the prosecution's explanation is of record," we do not examine whether the defendants established a *prima facie* case; instead, we "review only the district court's finding of discrimination *vel non*." *United States v. Forbes*, 816 F.2d 1006, 1010 (5th Cir. 1987).

The defendants focus on the prosecution's striking of potential juror nos. 9, 48, and 56. The government's stated reason for striking no. 9 was that he was employed by a company that was being investigated by federal authorities; because of this, the government felt his objectivity might be compromised. The prosecution struck no. 48 because she was a teacher's aide who helped teach speech therapy; the government suggested that she would be overly sympathetic to the defendants.[32] Finally, the government stated that it struck no. 56 because he was sleeping.

The district court's finding that the prosecution's justifications were not pretextual is entitled to "great deference." *Hinojosa*, 958 F.2d at 632. The court's decision "rests upon a credibility determination, and, thus, we interfere with that decision only if it is clearly erroneous or an abuse of discretion." *Id.*

The reasons given by the government were race-neutral on their face, and the district court found that

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[32] The defendants contend that this was pretextual, as the government did not strike no. 23, a white teacher at the Southern Louisiana Technical Institute. The government responds that it is reasonable to assume that someone who helped disabled children would be more sympathetic than someone who taught at a technical school. The explanation is reasonable.

they were not a pretext for discrimination. We find no error in that conclusion.[33]

VI.

Henry Lee Smith and Donna Turner were veniremembers and sat next to each other during voir dire. Turner eventually became jury foreman; Smith was not chosen to serve on the jury. According to Smith, during the afternoon break in voir dire, Turner stated that the defendants "need[ed] to go ahead and plead guilty and we can all go home because they look guilty anyway." Smith did not report Turner's alleged statements to the court at that time but apparently contacted defendants' counsel after trial.

At a hearing on the motion for new trial, Smith testified that Turner made the above-described statement and that he believed she was serious. Turner did not

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[33] *See, e.g., United States v. De la Rosa,* 911 F.2d 985, 991 (5th Cir. 1990) (Potential juror employed by church-affiliated agency might be more inclined to forgive defendant), *cert. denied* 111 S.Ct. 2275 (1991); *United States v. Melton,* 883 F.2d 336, 338 (5th Cir. 1989) (juror chewed gum and appeared generally inattentive); *United States v. Moreno,* 878 F.2d 817, 820-21 (5th Cir.) (Prosecutor's "gut reaction" that a commercial artist would have sympathy for persons involved with drugs), *cert. denied,* 493 U.S. 979 (1989); *United States v. Lance,* 853 F.2d 1177, 1180-81 (5th Cir. 1988) (appearance of inattentiveness); *United States v. Forbes,* 816 F.2d 1006, 1010-11 (5th Cir. 1987) (juror had arms crossed and appeared to be hostile to serving on jury); *United States v. Ratcliff,* 806 F.2d 1253, 1256 (5th Cir. 1986) (juror fell asleep during jury selection), *cert. denied,* 481 U.S. 1004 (1987).

testify at the hearing but submitted a handwritten statement denying that she ever had commented on the guilt or innocence of the defendants during voir dire. She also stated that she answered truthfully when asked by the court during voir dire whether she had formed an opinion about the case. The court denied the motion for new trial.

The defendants argue that Turner's failure to disclose her biases against them deprived them of an impartial jury. Both parties suggest that the analysis as set forth in *McDonough Power Equip. v. Greenwood*, 464 U.S. 548 (1984), is appropriate in this case. Under *McDonough*, in order to succeed in a motion for a new trial based upon jury misconduct, a party must show (1) that the juror failed to answer a material question honestly on voir dire and (2) that a correct response would have provided a valid basis for challenge for cause. *Id.* at 556; *United States v. Scott*, 854 F.2d 697, 698 (5th Cir. 1988) (applying *McDonough* to criminal context). In evaluating a claim of juror misconduct, we begin with the presumption that the juror is impartial, and "it is incumbent upon the defendant to prove otherwise." *United States v. Wayman*, 510 F.2d 1020, 1024 (5th Cir.), *cert. denied*, 423 U.S. 846 (1975).

The defendants contend that they have met their burden. First, they argue that they have shown dishonesty by the fact that Turner failed to respond when the district court asked whether any prospective juror had formed any opinion about the case. Second, they argue that had Turner responded, she would have been struck for cause.

We do not believe the *McDonough* framework is applicable here, as it implicitly presumes a case in which a juror concealed an objective material fact. *See Scott*, 854 F.2d at 699 (juror "conceal[ed]" the "material fact[]" that his brother was a deputy sheriff).[34] In cases like this one, where jurors may have made premature expressions as to guilt, we generally defer to the district court's decision as to whether the defendant received a fair trial by an impartial jury, as the court is in "a far better position to judge the mood at trial and the predilections of the jury" than is an appellate court that "ha[s] only an insentient record before [it]." United States v. Chiantese, 582 F.2d 974, 980 (5th Cir. 1978), *cert. denied*, 441 U.S. 922 (1979).[35]

First, the district court must determine whether the juror actually made the statements in question.[36] This

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[34] *See also United States v. Ortiz*, 942 F.2d 903, 909 (5th Cir. 1991) (juror's cousin and sister were employees of the United States Attorney's office), *cert. denied*, 112 S. Ct. 2966 (1992). *McDonough* was a personal injury case in which a juror failed to disclose that a close relative recently had been injured. 464 U.S. at 550.

[35] The situation presented in this case is somewhat atypical, however, as Smith waited until long after the alleged statement was made, and after trial, before contacting defense counsel. In the usual case, the "overhearer" reports the alleged statement to the court immediately. At that point, the court must decide whether and to what extent it should investigate. our usual task, then, is to review the adequacy of the court's investigation and its ultimate determination that the defendant received a fair trial by an impartial jury. *See e.g., United States v. Webster*, 750 F.2d 307, 336-39 (5th Cir. 1984), *cert. denied*, 471 U.S. 1106 (1985); *Chiantese*, 582 F.2d at 978-80.

[36] *See Chiantese*, 582 F.2d at 980; *see also United States v. Hendrix*, 549 F.2d 1225, 1229 (9th Cir.) (in considering the effect

determination necessarily requires the court to judge the credibility of the person who allegedly overheard the statement (in this case, Smith). In *Grooms v. Wainwright*, 610 F.2d 344, 347 (5th Cir.), *cert. denied*, 445 U.S. 953 (1980), the mother of the defendant stated that she had heard a juror remark at the close of the prosecution's case that "[a]s far as I'm concerned, [from] what I heard already he's guilty." We held that the district court "was in a good position to evaluate" the mother's credibility and to "observe her demeanor." *Id.*[37]

In this case, the defendants' argument rests on the presumption that Turner in fact did make the statement. The court, however, credited Turner's denial, and we defer to its judgment. Moreover, it credited Turner's statement that she was unbiased and found that the defendants received a fair trial by an impartial jury. We find no reason to disturb that conclusion.[38]

VII.

The defendants aver that the district court erred in not suppressing certain statements they made while

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of a juror's statements as to defendant's guilt, trial court must determine whether allegations against juror are true; if it finds allegations true, it must determine whether new trial is required), *cert. denied*, 434 U.S. 818 (1977).

[37] In *Grooms*, we also noted that the statement, if made, was not reflective of serious prejudice. 610 F.2d at 348. The first aspect of the *Grooms* inquiry – the credibility of the "overhearer" – was an important part of the analysis, however. *See Webster*, 760 F.2d at 338 n.15 (in *Grooms*, "it was not clear that the juror had in fact made the offending statement").

[38] *See United States v. Robbins*, 500 F.2d 650, 653 (5th Cir. 1974) (trial court entitled to credit juror's denial of bias).

being questioned by the FBI on August 10. *Miranda* warnings[39] are required only when the defendant is in "custody." *Berkemer v. McCarty*, 468 U.S. 420, 441 (1984). We have defined "custody" as follows:

> A suspect is . . . "in custody" for Miranda purposes when placed under formal arrest or when a reasonable person in the suspect's position would have understood the situation to constitute a restraint on freedom of movement of the degree which the law associates with formal arrest.

United States v. Bengivenga, 845 F.2d 593, 596 (5th Cir.) (en banc), *cert. denied*, 488 U.S. 924 (1988) (citation omitted).

It is undisputed that neither Ross nor Collins was under formal arrest at the time; the only question, then, is whether their freedom was restrained to such a degree as to constitute a *de facto* arrest. We agree with the district court that neither defendant reasonably could have understood that his situation was equivalent to that of an arrest.

Both men were told explicitly and repeatedly that they were not under arrest and were free to leave. Neither was arrested at the termination of the interview. As the Eighth Circuit has noted, "[t]he most obvious and effective means" of demonstrating that a suspect has not been taken into custody "is for the police to inform the suspect that an arrest is not being made and that the suspect may terminate the interview at will." *United*

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[39] *Miranda v. Arizona*, 384 U.S. 436 (1966).

States v. Griffin, 922 F.2d 1343, 1349 (8th Cir. 1990) (citing cases).[40]

The defendants respond that even though they were told they were not under arrest, their freedom of movement was restrained during the encounter with the agents. Neither defendant experienced a restraint equivalent to that associated with custody, however.

The only restraint Ross experienced was when the agents searched his person. He was not physically inhibited while the agents were questioning him. In addition, he was told that he was free to leave and indeed did leave while the agents searched his office. This did not rise to the level of a custodial situation.

Collins's movement was restrained more significantly. Collins's car was stopped on the street, and he was escorted to his chambers. But although a temporary Fourth Amendment seizure may have occurred incident to the execution of the search warrants, a Fifth Amendment custodial situation did not. As we noted in *Bengivenga*, although both "seizure" and "custody" speak to restraints of freedom, "[t]he critical difference between the two . . . is that custody arises only if the restraint on freedom is a certain degree – the degree associated with formal arrest." 845 F.2d at 598.

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[40] *See also Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (Per curiam) (no "custody" where defendant was asked to come down to the police station, was told that he was not under arrest, and was allowed to leave after the police interview ended); *California v. Beheler*, 463 U.S. 1121, 1122 (1983) (same).

The stopping of the car did not rise to the level of custody, as subsequent events immediately dispelled any possibility that a custodial situation would develop. As the district court found,

> Collins was offered several options to avoid embarrassment on the street by the searches and he voluntarily decided that he would rather have the matter taken care of privately. He voluntarily chose to go to his chambers with the agents. He was not commanded to.[41]

Thus, after the car was stopped, the restraint Collins experienced was no greater than that encountered by the defendants in *Mathiason* and *Beheler*, who were asked to come to the police station for an interview.[42]

The defendants also argue that the fact that they were told they were not under arrest and were free to leave was "meaningless" because the agents informed them that the agents possessed incriminating evidence. We disagree.

In *Mathiason*, the police interviewer informed the interviewee-suspect that the police had evidence of his

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[41] Collins gives us no reason to question these factual findings; thus we accept them as not clearly erroneous. *United States v. Harrell*, 894 F.2d 120, 122-23 (5th Cir.), *cert. denied*, 111 S. Ct. 101 (1990).

[42] *See also United States v. Jimenez*, 602 F.2d 139, 144 (7th Cir. 1979) (no "custody" where officers curbed suspect's car but did not display a weapon or threaten her physically or verbally).

involvement in a crime. 429 U.S. at 493.[43] The Court found that "a noncustodial situation is not converted to one in which *Miranda* applies" simply because "the questioning took place in a 'coercive environment.' " As the Court continued,

> Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody." It was *that* sort of coercive environment to which *Miranda* by its terms was made applicable, and to which it is limited.

Id. at 495. Thus, while it may be true, as Ross argues, that being confronted with adverse evidence or being told that one could be charged with a crime is "designed to p[sy]c[h]ologically overcome [the interviewee's] ability to

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[43] The police told the interviewee that they had found his fingerprints at the scene of the crime; in fact this was not true. The Court found that the fact that the police lied to the interviewee had no impact on the *Miranda* custody analysis. 429 U.S. at 495-96.

gather his thoughts and intelligently determine his circumstances," it does not transform the interview into a custodial situation.

We acknowledge that there may be situations in which the defendant is informed that he is not under arrest but where the circumstances suggest otherwise. That did not happen here. We therefore conclude that, based upon the totality of circumstances, the defendants were not in custody.

VIII.

In his closing argument, the prosecuting attorney stated the following: "There was already $16,000.00 in [Collins's] chambers. He had already started spending it. And he won't tell anybody what it's for. If it's a real estate deal, tell us." Collins argues that this constituted an improper comment on his failure to take the stand.[44] Additionally, he emphasizes the fact that the prosecutor (1) pointed to him when making the statement; (2) raised his voice when stating his name; and (3) used the present tense.

The test for determining whether a prosecutor's remarks constitute a comment on a defendant's silence is a twofold alternative one: "(1) whether the prosecutor's manifest intent was to comment on the defendant's silence or (2) whether the character of the remark was

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[44] Ross adopts Collins's arguments as to this ground. It is difficult to see, however, how the alleged comment could have prejudiced Ross's rights, given that he testified.

such that the jury would naturally and necessarily construe it as a comment on the defendant's silence." *United States v. Jones*, 648 F.2d 215, 218 (5th Cir. Unit B June 1981) (per curiam).

As to the first possibility, the prosecutor's intent must be "manifest"; in other words, the test is not met "if some other explanation for his remark is equally plausible." *United States v. Rochan*, 563 F.2d 1246, 1249 (5th Cir. 1977). As to the second, "the question is not whether the jury possibly or even probably would view the challenged remark in this manner, but whether the jury *necessarily* would have done so." *United States v. Car-rodeguas*, 747 F.2d 1390, 1395 (11th Cir. 1984), *cert. denied*, 474 U.S. 816 (1985) (citation omitted).

The district court found that, taken in context, the remark referred not to Collins's failure to testify but to the implausibility of his trial defense, which was that the money was for a real estate transaction involving Mahogany, Inc. Indeed, a key aspect of the government's case was that when interviewed by the FBI on August 10, Collins and Ross denied having any current business dealings with each other. As the district court put it, the government's argument on this point was that "if the cash was from a legitimate real estate deal (as counsel for both defendants told the jury in opening statements), then why didn't the defendant just say so on August 10?"

We agree that the prosecutor's comment was not improper when taken in context. Prior to making the allegedly inappropriate statement, the prosecutor repeatedly had referred to the August 10 interviews and to the

inconsistency between the defendants' statements at that time and their defense at trial.

The prosecutor started out by giving an overview of the evidence, directing the jury's attention to the testimony of the FBI agents,

> who have told you in no uncertain terms what the defendant said to them on the 10th of August, 1990, when all this cash was found, and they said, ["]I never gave any cash to Judge Collins.["] Judge Collins said[,] ["]I never got any cash from John Ross.["] John Ross said[,] ["]I never got any cash from Gary Young.["] . . . Those were lies. About the only truthful thing they said that day was that there were no real estate transactions between the two of them.

Moments later, the prosecutor again directed the jury's attention to August 10, stating,

> Most importantly, let's look at their own word[s]. Both of them were interviewed by the FBI on August 10th, both of them said ["]no real estate deals, none. I don't have one. Haven't had one in three years. Nothing recent.["]

The prosecutor then directed the jury to the testimony of Agent Cleveland, stating,

> When [he] interviewed Judge Collins on August 10th, twice, not once, but twice, Judge Collins told him, ["]I have no real estate deals with John Ross. . . . ["] [H]e said: ["]I don't have any records of real estate deals to give you because I haven't had any real estate deals with him. Not records, real estate deals.["]

Soon thereafter, the prosecutor directed the jury's attention to the way in which Collins and Ross discussed the so-called real estate deal:

> Listen to what [the tapes] say about this real estate deal. Listen to the tone. . . . Judge Collins barely speaks in any of those conversations, "Uh-huh, yeah. Okay." If it's a real estate deal, why can't he talk? They don't mention any specifics. Everything is vague. They always have to meet to discuss it. They can't ever talk about it on the phone. You hear them talking about estimates to deliver. ["]I have some information to show you.["] Well, ladies and gentlemen, if it[']s going to be cash and money that they are going to give each other, and it's legitimate, and it really is for a real estate deal, why don't they say so?

With the assistance of charts, the prosecutor then took the jury through a timeline of events from September 1989 through August 1990. Once again, he ended up with the events of August 10, stating,

> Finally, the statements to the FBI, ["]no cash. . . . [N]o real estate transactions.["] That is the true statement they had. If there had really been an innocent real estate transaction going on, why wouldn't either of them have said, ["]Look, yes, I have a real estate transaction. I got some cash from them. We don't have a contract.["] Why wouldn't they say that? Because they hadn't thought of it yet.

At this point, the defendants' attorneys gave their closing arguments, during which they examined the government's case and attempted to draw out any inconsistencies. Collins's attorney explained Collins's statements of August 10 as follows:

> I'm not going to sit here, ladies and gentlemen, to tell you that at some point in that conversation Agent Cleveland didn't say [to Collins], ["]Have you gotten any cash money from John Ross at any time?["] I don't know. My guess is [is that] he probably did get that question in along with all of the questions about the records and the transactions and [the] bribe, and what you end up doing is you say ["]no, no, no, no, I didn't do anything. Why are you doing this to me?["] . . .

He then reiterated the explanation:

> And the government wants to tell you, ["W]ell, if he had done nothing wrong I would have expected he would have just given an explanation for everything that had happened.["] They weren't there for an explanation, ladies and gentlemen. As they said, Judge Collins has been on the bench for 13 years. He has seen these cases. He knows what happens when federal agents come in and they have a search warrant and an instanter subpoena on a federal judge. . . . They are not there for explanation. They are there to solidify the case. And your reaction is to say ["]I don't know, or no, no, no.["][45]

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[45] Although Collins faults the prosecutor for using the present tense, his attorney did so as well. As is shown by the passages excerpted *supra*, the prosecutor used the present tense throughout his closing argument.

Thus, Collins's attorney stressed that because of his experience on the bench, Collins knew what was going on that day – the agents were attempting to "solidify [their] case" against him. According to Collins's attorney, Collins's natural response therefore was to deny everything.

On rebuttal, the prosecutor turned this reasoning around. As noted above, he stated that "[t]here was already $16,000 in his chambers. He had already started spending it. And he won't tell anybody what it's for. If it's a real estate deal, tell us." Then, referring to Collins, he stated,

> He is a federal judge for 13 years. He signed search warrants himself for years. He's presided over these trials for years. Are you going to tell me that he isn't capable *at that moment*, if there is a reasonable, innocent, legitimate explanation, from saying ["]Let me tell you what it's all about?["] He knows how the system works. He knows that you can explain. But, no, [Collins's attorney] wants to create out of whole cloth in his own mind what happened. [Emphasis added.]

The prosecutor therefore was referring to Collins's denial "at that moment" (August 10) that he had had any business dealings with Ross. The prosecutor's argument was that, contrary to Collins's attorney's contention, a judge in Collins's position would not reflexively deny his business dealings with Ross; instead, given his intimate familiarity with the judicial process, he would be eager to provide the authorities with a legitimate explanation for the presence of the money in his chambers.

In sum, the remark was not objectionable, as there was an "equally plausible" explanation other than that it was a comment on Collins's failure to testify. *Rochan*, 563 F.2d at 1249. Moreover, because of this explanation, the jury would not "necessarily" have understood the remark as such a comment. *See Carrodeguas*, 747 F.2d at 1395.[46] We therefore find that the prosecutor did not impermissibly comment on Collins's failure to take the stand.[47]

IX.

Collins argues, in the alternative, that even if the prosecutor was referring to the events of August 10, his remark constituted an impermissible comment on Collins's pre-arrest silence.[48] The circuits appear to be

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[46] This is true even though the prosecutor may have pointed at Collins while he was speaking and raised his voice while stating Collins's name. These actions reasonably would have been viewed by the jury as the prosecutor's attempt to add emphasis to his argument relating to Collins's August 10 denials.

[47] Even if the prosecutor did comment on Collins's failure to testify, it is plain beyond a reasonable doubt that, given the weight of the evidence, the jury would have returned a guilty verdict absent the remark. *See United States v. Kane*, 887 F.2d 568, 576 (5th Cir. 1989), *cert. denied*, 493 U.S. 1090 (1990).

[48] Again, we fail to see how Ross could have been prejudiced by the prosecutor's comment. Moreover, it is well established that a prosecutor may comment on a *testifying* defendant's pre-arrest silence in order to impeach him. *See Jenkins v. Anderson*, 447 U.S. 231, 235-40 (1980); *see also United States v. Cardenas Alvarado*, 806 F.2d 566, 572 (5th Cir. 1986). Thus, because Ross testified, he could be impeached by his own pre-arrest silence.

divided on the issue of whether the prosecution may comment on a *non-testifying* defendant's pre-arrest silence.[49] We have noted in passing that such comment might be proper, although we have not addressed the question squarely.[50]

We need not reach this question, however, as the prosecutor's comments were directed primarily toward Collins's affirmative statements – his denial of any business dealings with Ross – as distinguished from his silence. Although the prosecution did point out Collins's failure to provide a legitimate explanation for the presence of the money in his chambers, this was merely an inference drawn from the fact that Collins affirmatively

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[49] *See United States v. York*, 830 F.2d 885, 895-96 (8th Cir. 1987) (prosecutor may comment on the inconsistency between non-testifying defendant's pre-arrest silence and his trial defense), *cert. denied*, 484 U.S. 1074 (1988); *but see United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1017-19 (7th Cir. 1987) (admission of evidence of non-testifying defendant's pre-arrest silence was error, but harmless); *United States v. Davenport*, 929 F.2d 1169, 1174 (7th Cir. 1991) ("it violates clause to allow into evidence testimony that the defendant refused to give a statement to the police when first approached by them," citing *Lane*, *cert. denied*, 112 S. Ct. 871 (1992). The Seventh Circuit recently limited *Lane's* scope to those situations in which the defendant is completely silent, as opposed to situations in which the defendant answers some questions and then refuses to answer others. *Davenport*, 929 F.2d at 1174-75. The court also found that if there was error, it was harmless. *Id.* at 1175.

[50] *See United States v. Cardenas Alvarado*, 806 F.2d 566, 572 (5th Cir. 1986) ("if testimony relates to pre-arrest silence, the Constitutional claim has no merit").

had denied having any business deals with Ross.[51] We therefore find that the prosecutor commented on Collins's

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[51] Specifically, on two separate occasions Collins affirmatively denied having any business dealings with Ross. The first was during the ride to the courthouse. The testimony of Agent Cleveland was as follows:

> Q: Did [Collins] say anything about whether he had accepted money from John Ross for Gary Young's sentencing?
>
> A: He said he accepted no money at all from John Ross concerning sentencing or any other reason.
>
> Q: Did he anything about whether he had any business or financial dealings with John Ross?
>
> A: Yes, sir. He said he had none.

The second denial occurred in Collins's chambers. The testimony of Agent Cleveland was as follows:

> Q: Did you serve [the] subpoena on him?
>
> A: Yes.
>
> . . .
>
> Q: When you gave Judge Collins this subpoena where was he?
>
> A: He was in his chambers.
>
> . . . Q: When you gave Judge Collins the grand jury subpoena what did he do?
>
> A: He read the attachment [that listed the documents requested].
>
> . . .
>
> Q: Did he make any response to it?
>
> A: Yes, sir.
>
> Q: What did he say?
>
> A: In reference to the . . . second paragraph requesting any and all documents . . . concerning the real estate or personal financial transaction [between him and Ross], he said he had no records because none existed as he had none of these.
>
> Q: Had none of these transactions with whom?
>
> A: John Ross.

pre-arrest statements, not his silence, and that it was proper for the prosecutor to point out the inconsistency between the statements and Collins's trial defense.[52]

X.

An order authorizing a wiretap, like an ordinary search warrant, must be supported by a finding of probable cause. *United States v. Gonzales*, 866 F.2d 781, 786 (5th Cir.), *cert. denied*, 490 U.S. 1093 (1989). The defendants argue that the application for the first wiretap "completely lacked probable cause" and that therefore all information obtained thereby and by subsequent wiretaps should have been suppressed.[53]

The defendants argue that the application for the wiretap was flawed because it (1) lacked "any indicia of reliability" for Young; (2) contained "an abundance of stale information; and (3) contained "[a]t least one if not

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Collins argues that by referring to the $16,000 and then asking, "Are you going to tell me that he isn't capable *at that moment* . . . from saying ['']Let me tell you what it's all about['']?" (emphasis added), the prosecutor was "specifically confin[ing]" his commentary "to the scene in chambers" when the money was discovered, as the opposed to the ride to the courthouse. From this, Collins argues that "it necessarily follows that the jury would . . . assume that [the prosecutor] was referring to the Judge's silence . . . in chambers." But, as the above testimony indicates, Collins did make affirmative denials in chambers.

[52] Again, even if the prosecutor's comments were improper, any error would be harmless. *See supra* n.47.

[53] Presumably, the defendants are challenging Agent Cleveland's application of May 18.

more deliberate falsehoods or misstatements." The district court denied the motion to suppress.

A.

The defendants essentially argue that the FBI failed to inform Judge Duhé of material facts regarding Young's reliability. They further argue that had Judge Duhé had access to those facts, he would have discounted the information contained in the application that was provided by Young, leaving insufficient information upon which to base a finding of probable cause.

The application stated that Young previously had served a federal prison term for illegal drug offenses and now was cooperating with federal authorities as part of a plea agreement involving "various illegal drug offenses." The defendants argue that the FBI should have included both a more detailed description of Young's prior conviction and the fact that after being sentenced, Young was brought before a federal grand jury to testify under a grant of immunity but refused to testify. The defendants point to no authority requiring the agents to provide detailed information about an informant's criminal past (Indeed, wiretap applications are often based upon information from informants whose identity is unknown.), nor do they suggest that the FBI deliberately misled Judge Duhé as to Young's criminal past.

Moreover, there is no reason to think that inclusion of additional information about Young's criminal past would have made any difference. Judge Duhé was informed that Young was a convicted drug dealer and

that he now was cooperating pursuant to a plea agreement. This was sufficient to inform Judge Duhé of Young's reliability; the additional information would have been merely cumulative.

As for the omission of the fact that Young had failed to testify in a grand jury proceeding, this information would have had little or no impact on Young's reliability. Such information would only go to show Young's disinclination to give information to the authorities; here, that was not a problem, as Young was actively cooperating. We therefore reject the defendants' arguments as to Young's reliability.

B.

The defendants also assert that the application contained three lies. In order to obtain a hearing on allegedly deliberate falsehoods contained in a wiretap application, the defendant is required to make a substantial preliminary showing that the application contains a false statement made knowingly or intentionally, or with reckless disregard for the truth, and that the statement is necessary for a finding of probable cause. *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978). The district court found that the defendants did not make this showing.

1.

The defendants first point to the application's characterization of the October 12, 1989, conversation between Ross and Young, which was as follows: "Ross indicated that he could help Young with Collins because of Ross's

personal relationship with Collins and also by giving Collins money." We agree with the district court that this was an accurate summary of the Young-Ross conversation.

The purpose of the meeting was to discuss whether Ross would assist Young with his case if it came before Collins. Young had paid Ross $2,500 on the previous day for his services. During the meeting, Ross told Young about his influence over Collins and instructed him to start "accumulating" because "big change" was going to be required. In addition, in the midst of references to money to be paid by Young, Ross stated, "I mean he would do it for that . . . he'll do [it] . . . for something like that." Ross also stated that in addition to "that," he would be asking Collins for a personal favor.

Considering these statements in the context of the meeting, the application's summary was accurate. Indeed, an experienced agent is permitted to draw reasonable inferences and interpretations of statements in the context of a series of conversations and events. As the district court concluded, Cleveland, who applied for the wiretap, "has been an FBI agent for 19 years, therefore, it was reasonable for him to infer from the conversations on these two days, that defendant Collins was to be given money. This is not a misstatement made in reckless disregard of the truth." We agree.

2.

The second statement the defendants point to is the following:

> During this [October 12] meeting, Ross told Young that for this assistance with Judge Collins it would take one hundred thousand dollars ($100,000). (Review of the tape recording of this. conversation clearly shows that the two men discussed money, but the specific amount is unintelligible; Young has advised [the FBI] that the amount discussed was one hundred thousand dollars ($100,000).)[.]

During the September 29 meeting between Ross and Young, Young stated, "I'll get you a hundred thousand dollars.[54] During the October 12 meeting, Ross confirmed that he previously had discussed a particular figure with Young, stating that "[w]hen you mention th – , that number to me. . . . " A few moments later, Ross stated, "In this case, if you can do what you say you can do, and I'm banking on that. . . . "[55] Given that the application readily admits that the specific amount was unintelligible on the tape, we conclude that the application did not contain a deliberate falsehood.

3.

Finally, the defendants focus on a statement in the application that asserts that Ross told Young during their October 12 conversation that Ross had "helped" another defendant who had appeared before Collins. They argue

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[54] Cleveland became aware of the $100,000 figure months after submitting the wiretap application, at which time the recording of the September 29 conversation was enhanced.

[55] The defendants argue that money was not discussed, but we believe this is a reasonable inference to be drawn from the statements.

that it was wrong for the FBI to assume in its application that this "help" was illegal. Again, this is a reasonable inference from the conversation and the context of the meeting and does not constitute a deliberate falsehood.

C.

The defendants next argue that the application contained "stale" information. Information may be considered stale if it does not go toward showing "a long-standing, ongoing pattern of criminal activity." *United States v. Webster*, 734 F.2d 1048, 1056 (5th Cir.), *cert. denied*, 469 U.S. 1073 (1984). In particular, the defendants point to the affidavit's summary of various allegations of bribery and corruption against Collins that were raised during his confirmation hearing before the Senate Judiciary Committee. The affidavit also contained a summary of similar allegations against Collins that arose after he was on the federal bench.[56]

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[56] The affidavit contained the following statements:

Collins served as an Orleans Parish Magistrate-Judge until he was confirmed as a United States District Judge in May 1978. During the FBI background investigation, there were allegations that Collins was furnished prostitutes and other gifts by some bondsmen and attorneys in exchange for favorable consideration at bond hearings. . . . It was also alleged that in 1971 Collins had received part of a forty thousand dollar ($40,000) cash payment used to buy votes for Edwin Edwards in a gubernatorial primary election. After inquiring at length into these allegations, the Senate Judiciary Committee approved Collins' appointment.

[A]nother FBI file . . . reflects an allegation, received in May 1986, that in late 1982 or early 1983 Judge Collins accepted a five thousand dollar ($5,000) bribe to allow an appeal bond to [a]

We need not decide whether the information was "stale," as we agree with the district court that deletion of the information would not have affected the probable-cause determination. The affidavit, as noted above, contained detailed information concerning the conversations between Ross and Young that implicated Collins. If the authorizing judge uses "common sense and bases [his] finding upon the entire picture presented to [him]," the determination is conclusive in the absence of arbitrariness. *Gonzales*, 866 F.2d at 786. We find no such arbitrariness here.

D.

The defendants also argue that the application failed to meet the dictates of 18 U.S.C. § 2518(1)(c), which requires a wiretap application to include a "full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." We have held that the purpose of this section "is not to foreclose electronic surveillance until every other imaginable method of investigation has been unsuccessfully attempted." *Webster*, 734 F.2d at 1055. Rather, the section "is designed to inform the issuing judge of the difficulties involved in the use of conventional techniques and to insure that wiretapping is not

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convicted narcotics trafficker. . . . Investigation failed to substantiate the allegation, and the United States Department of Justice's Public Integrity Section declined prosecution because of insufficient evidence.

resorted to in a situation in which traditional investigative techniques will suffice to expose crime." *Id.*

With these considerations in mind, we have held that "[i]t is enough if the affidavit explains the prospective or retrospective failure of several investigative techniques that reasonably suggest themselves." *United States v. Hyde*, 574 F.2d 856, 867 (5th Cir. 1978). The application in this case met this standard.

Among other things, it stated that physical surveillance of Ross and others would show that meetings were taking place but would not supply the content of those meetings. It also stated that consensual monitoring (as that used with Young) would be impossible, as it was unlikely that Young was going to be present during the "ultimate illegal activity that is expected to occur" between Ross and Collins. Finally, it stated that it was unlikely that any written records would be kept of the meetings between Ross and others. This is more than sufficient information to meet the requirements of section 2518(1)(c).[57]

XI.

Ross received the pattern jury instruction for entrapment[58] that has been upheld on numerous occasions. See

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[57] As the defendants directly challenge only the first wiretap application, which we find to be sufficient, we need not consider the adequacy of subsequent applications.

[58] The court instructed the jury as follows:

> Defendant Ross has asserted that he was the victim of entrapment. Where an individual has no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officers, or

United States v. Martinez, 894 F.2d 1445, 1450 (5th Cir.), *cert. denied*, 111 S. Ct. 351 (1990); *United States v. Johnson*, 872 F.2d 612, 622 (5th Cir. 1989). He contends that the jury should have been instructed that he was maintaining his innocence and in the alternative was claiming that he was entrapped. He bases this argument upon *Matthews v. United States*, 485 U.S. 58 (1988).

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by their agents, to commit a crime, that person is a victim of entrapment, and the law as [a] matter of policy forbids that person's conviction on such a case. On the other hand, where an individual already has the readiness and the willingness to break the law, the mere fact that the government agents provide what appears to be a favorable opportunity is not entrapment. For example, it is not entrapment for a government agent to pretend to be someone else, and to offer, either directly or through some informer or other individual, the opportunity to engage in an unlawful transaction.

If you should find beyond a reasonable doubt from all the evidence in the case that, before anything at all occurred relating to the alleged offense involved in this case, that the defendant Ross was ready and willing to commit a crime as charged in the indictment whenever the opportunity was afforded, and that the government officers or their agents did no more than offer the opportunity, then you should find defendant Ross is not a victim of entrapment. On the other had [sic], if the evidence in the case should leave you with a reasonable doubt as to whether or not defendant Ross had a previous intent or purpose to commit the offense charged, apart from the inducement or persuasion of the officer or agent, then it would be your duty to find defendant Ross not guilty. The burden is on the government to prove beyond a reasonable doubt that defendant Ross was not entrapped.

Matthews holds that the jury must be given an instruction on entrapment when there is sufficient evidence from which a jury could find entrapment, even when the defendant denies culpability for the crime. *Id.* at 62. *Matthews* speaks to *when* an entrapment instruction should be given, not to *what* that instruction should say. *Matthews* thus is inapplicable, as Ross received an entrapment instruction.

Moreover, the jury repeatedly was told that the defendants were denying culpability; indeed, that was the essence of the trial. It thus was not necessary for the court specifically to tell the jury, in its entrapment instruction, that Ross was denying culpability. See *United States v. Fotovich*, 885 F.2d 241, 242 (5th Cir. 1989) (sufficiency of jury charge is determined by looking at the entire jury charge in the total context of trial), *cert. denied*, 493 U.S. 1034 (1990).

XII.

The defendants challenge the computation of their sentence. The guidelines establish a base offense level of 10 for "[o]ffering, [g]iving, [s]oliciting, or [r]eceiving a [b]ribe," U.S.S.G. § 2C1.1(a), and permit an eight-level enhancement if the offense involves a payment for the purpose of "influencing an elected official or any official holding a high level decision-making or sensitive position." *Id.* § 2C1.1(b)(2)(B).

But sections 2C1.1(a) and (b) do not apply in all cases. At the time the defendants were sentenced, section 2C1.1(c)(l) stated,

> If the bribe was for the purpose of concealing or facilitating another criminal offense, or for obstructing justice in respect to another criminal offense, apply § 2X3.1 (Accessory After the Fact) in respect to such other criminal offense if the resulting offense level is greater than that determined [by using § 2C1.1(a) and (b)].[59]

Section 2X3.1 provides a base level offense of "6 levels lower than the offense level for the underlying offense."

In this case, the "underlying offense" – Young's conviction for importing over 2,500 pounds of marihuana – carries a base offense level of 32. U.S.S.G. § 2D.1.1(6). Cross-referencing the accessory-after-the-fact sentence to Young's offense level produces a base offense level of 26, which is greater than the offense level of 18 produced by using section 2C1.1(a) and (b).

The district court utilized section 2C1.1(c)(l) and assigned the defendants a base offense level of 26. It then gave them a two-level enhancement pursuant to section 3C1.1, "Obstructing or Impeding the Administration of Justice," yielding an offense level of 28.[60]

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[59] The defendants were sentenced in September 1991. In November 1991, this section of the guidelines was split into two sections, separating the penalties for "facilitating" another offense (which is now U.S.S.G. § 2C1.1(c)(1)) and "concealing" or "obstructing justice in respect to" another offense (which is now *id.* § 2C1.1(c)(2)). This change is not relevant here.

[60] Collins explicitly states in his brief that his sentence was enhanced two levels for "obstruction of justice." It appears from the PSI and the sentencing hearing, however, that the two-level enhancement was pursuant to U.S.S.G. § 3B1.3, which permits a two-level enhancement when "the defendant abused a position

Both defendants argue that the court should not have applied the cross-reference to Young's offense, as that offense took place prior to the effective date of the guidelines (November 1, 1987). In addition, Ross challenges the enhancement for obstruction of justice under section 3C1.1.

A.

We find that the district court properly used the cross-reference to Young's pre-guidelines offense in determining the sentences.[61] It is now well-established that "pre-Guideline conduct may be considered in arriving at the Guideline offense level." *United States v. Parks*, 924 F.2d 68, 72 (5th Cir. 1991). Moreover, all of the defendants' conduct occurred after the guidelines were in place. Thus, there are no *ex post facto* concerns here, as the punishment was set in place prior to any culpable acts.

An analogous situation is presented when guideline penalties cross-reference to state law violations, even though such violations consist of conduct that is outside the scope of the guidelines. Other circuits have upheld the state violation cross-reference. *See United States v. Willis*, 925 F.2d 359, 360-62 (10th Cir. 1991); *United States v.*

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of public . . . trust . . . in a manner that significantly facilitated the commission or concealment of the offense." This discrepancy does not affect our analysis, however, as Collins's only ground for error in the sentencing context is the cross-reference to Young's offense, which is considered below.

[61] We apply a *de novo* standard of review, as this issue involves an interpretation of the guidelines. *See United States v. Lara-Velasquez*, 919 F.2d 946, 953 (5th Cir. 1990).

Smith, 910 F.2d 326, 329-30 (6th Cir. 1990). As the Tenth Circuit has noted, "the cross reference merely allows the sentence for the charged crime [that falls under the guidelines] . . . to reflect the reality of the crime." *Willis*, 925 F.2d at 361. Here, the defendants have offered no other way in which a court could take into account the seriousness of the underlying offense.

Collins points to the fact that Young, who was sentenced under the pre-guidelines sentencing scheme, received only three years' imprisonment, whereas Collins was sentenced to almost seven years under the guidelines. But there is no inequity here: Young committed a pre-guidelines offense; Collins did not.

B.

Ross objects to the district court's enhancement under section 3C1.1 for obstruction of justice. Under this section, the court may increase the offense level by two if the defendant "willfully obstructed or impeded, or attempted to obstruct or "impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense. . . . " Application note 1 states that "[t]his provision is not intended to punish a defendant for the exercise of a constitutional right." It adds that "[a] defendant's denial of guilt (other than a denial of guilt under oath that constitutes perjury) . . . is not a basis for application of this provision." In applying this provision, the court is instructed to evaluate alleged false testimony "in a light most favorable to the defendant."

Ross argues that the enhancement placed an impermissible burden on his right to testify. Yet, as noted

above, the guideline plainly contemplates that a district court may use the enhancement when "a denial of guilt under oath . . . constitutes perjury." Indeed, "there is no protected right to commit perjury." *United States v. Grayson*, 438 U.S. 41, 54 (1978). The guideline section is tailored to protect a defendant's right to testify, while still permitting sentencing courts to take into account the fact that the defendant perjured himself. As we recently have held, "[t]hough the court may not penalize a defendant for denying his guilt as an exercise of his constitutional rights [including the right to testify], enhancement based upon perjury is permissible." *United States v. Goldfaden*, 959 F.2d 1324, 1331 (5th Cir. 1992).[62]

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[62] Seven of the eight circuits that have considered whether the enhancement impinges on the right to testify agree that it does not. *See United States v. Batista-Polanco*, 927 F.2d 14, 22 (1st Cir. 1991); *United States v. Acosta-Cazares*, 878 F.2d 945, 953 (6th Cir.), *cert. denied*, 493 U.S. 899 (1989); *United States v. Barbosa*, 906 F.2d 1366, 1369 (9th Cir.), *cert. denied*, 111 S.Ct. 394 (1990); *United States v. Keys*, 899 F.2d 983, 988 (10th Cir.), *cert. denied*, 111 S.Ct. 160 (1990); *United States v. Matos*, 907 F.2d 274, 276 (2d Cir. 1990); *United States v. O'Meara*, 895 F.2d 1216, 1220 (8th Cir.), *cert. denied*, 111 S.Ct. 352 (1990); *United States v. Wallace*, 904 F.2d 603, 604-05 (11th Cir. 1990) (per curiam). *But see United States v. Dunnigan*, 944 F.2d 178, 183 (4th Cir. 1991), *cert. granted*, 112 S.Ct. 2272 (1992).

Dunnigan distinguishes *Grayson* on the ground that that case addressed a pre-guidelines realm in which the sentencing court had broad discretion to be lenient. 944 F.2d at 184. We find that this is not a distinguishing factor, as the guideline plainly requires that the court evaluate the allegedly false testimony in the light most favorable to the defendant. In addition, the guideline is not designed to punish a defendant for exercising his constitutional right; nor is it designed to apply to denials of guilt "other than a denial of guilt under oath that constitutes perjury."

Ross also contends that the court failed to evaluate his testimony "in a light most favorable" to him in accordance with the application note. In *United States v. Garcia*, 902 F.2d 324, 326 (5th Cir. 1990), we suggested that "this note does not require the sentencing court to believe the defendant, but 'simply instructs the sentencing judge to resolve in favor of the defendant those conflicts about which the judge, after weighing the evidence, has no firm conviction.' " (Citation omitted.) In this case, the district court apparently had no conflicts to resolve, as it noted that "from the evidence which [it] heard" during trial, "an application of the adjustment" for obstruction of justice was "appropriate."[63] We find no error.

XIII.

In summary, we refuse to create a "federal judge excepting to the general rule that reasoned suspicion is not required before federal authorities may commence an investigation. We also conclude that the government's conduct was not so outrageous in this case as to constitute a due process violation. In addition, we find that the defendants failed to show that they were victims of selective prosecution.

We hold that the government's commencement of a telephone survey did not violate the defendants' due

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[63] Thus, the court based the enhancement not upon "the mere fact that the jury returned a verdict of guilty," as Ross suggests, but rather upon its own evaluation of the evidence. *See United States v. Benson*, 961 F.2d 707, 709 (8th Cir. 1992) (enhancement may not be based "solely upon [the defendant's] failure to convince the jury").

process rights. Nor were the defendants deprived of a fair and impartial jury because of juror misconduct. We also conclude that the government did not violate Batson in exercising its peremptory strikes. In addition, we find no violation of *Miranda*, as the defendants were not in custody when they made the incriminating statements.

Finally, we conclude that the prosecutor did not improperly comment on Collins's failure to testify, nor did he improperly comment on Collins's pre-arrest silence. In addition, we find that the wiretap application was sufficient, as was the court's entrapment instruction. The district court did not err in sentencing the defendants. The judgments of conviction and sentence therefore are AFFIRMED.

APPENDIX B

[p. 2] TELEPHONE CONFERENCE AT 2:10 P.M., JUNE 5TH, 1991

THE COURT: HELLO.

THE CONFERENCE OPERATOR: JUDGE YOUNG?

THE COURT: YES.

THE CONFERENCE OPERATOR: THIS IS THE CONFERENCE OPERATOR. I HAVE JULIAN MURRAY AND JIM COLE ON THE CONFERENCE CALL.

I WILL ADD YOU ON WITH THEM NOW.

THE COURT: OKAY. MR. MURRAY? HELLO.

MR. MURRAY: HELLO.

THE COURT: MR. MURRAY.

MR. MURRAY: YES.

THE COURT: YES. MR. COLE?

MR. COLE: YES, JUDGE. JOHN CAMPBELL IS ON AS WELL.

MR. CAMPBELL: HELLO, JUDGE.

MR. MURRAY: JULIAN MURRAY HERE WITH RALPH CAPITELLI AND SONNIE GARCIA AND FRANK YUDO.

THE COURT: OKAY. LET ME SAY THIS, GENTLEMEN. THIS IS ON THE RECORD.

IT'S BEING – I HAVE A COURT REPORTER HERE, SO I THOUGHT FOR THE INTEGRITY OF IT, IN CASE

ANYBODY HAS ANY CONCERN ABOUT SOMETHING SAID AT A LATER DATE, WE WILL HAVE IT ON THE RECORD. O.K.?

A VOICE: ALL RIGHT.

A VOICE: THAT'S GOOD, YOUR HONOR.

* * *

[p. 5] EVERYBODY TO HAVE THE CHANCE TO HAVE WHATEVER YOU WANT BROUGHT TO THE ATTENTION OF THE JURORS THROUGH ME, THE COURT, DOING IT, OF COURSE.

BUT THAT'S THE PROCEDURE WE ARE GOING TO BE STARTING ON, AND WE WILL THEN HAVE ABOUT 110 WITH FIFTY OR SIXTY MORE SITTING BY IF WE NEED THEM.

MR. COLE: ALL RIGHT. VERY WELL, JUDGE. THIS IS JIM COLE. THAT'S FINE.

THE COURT: YES. DOES ANYBODY HAVE ANY OBJECTION TO THAT.

A VOICE: I DON'T HAVE ANY OBJECTION, BUT I JUST WANT TO INFORM THE COURT THAT THERE IS GOING TO BE A GRAND PRIX RACE TAKING PLACE SATURDAY AND SUNDAY, THE 15TH AND 16TH, AND THEY ARE GOING TO BE BARRICADING THE STREETS AND I DON'T KNOW HOW QUICKLY AFTER THAT SUNDAY'S RACE CONCLUDES THEY ARE GOING TO BE ABLE TO REMOVE THE BARRICADES.

I ONLY TELL YOU THAT SO THAT MAYBE YOU CAN DISCUSS IT WITH THE CLERK OF THE COURT ON THESE JURORS, THAT THEY MAY HAVE SOME

DIFFICULTY GETTING TO THE COURT ON MONDAY MORNING.

THE COURT: I AM SURE THE BARRIERS WILL BE DOWN TO ENABLE EVERYBODY TO GET TO WORK ON MONDAY MORNING. I CAN'T IMAGINE THEY WON'T, BUT I WILL BRING IT TO THE CLERK'S ATTENTION IN ANY EVENT.

A VOICE: THANKS, JUDGE.

THE COURT: O.K. ALL RIGHT. NOW, ONE OF THE OTHER [p. 6] MATTERS THAT I HAVE ON MY LIST AND OBVIOUSLY IF YOU ALL HAVE SOMETHING MORE THAT I HAVE NOT COVERED, LET ME KNOW, THE GOVERNMENT SUBMITTED THEIR INFORMATION TO THE COURT ON THE PROCEDURE THAT'S BEEN FOLLOWED IN CONNECTION WITH THE POLL THAT WAS MADE.

THEY – I THINK IT'S CANDIDLY ADMITTED THAT NOTHING WAS OBTAINED AS A RESULT OF THE POLL, WHICH DOESN'T SURPRISE ME. I FIND, IN GOING OVER IT, NOTHING THAT COULD POSSIBLY HARM THE INTEGRITY OF THE JURY THAT WILL BE SELECTED.

I DO SAY TO THE GOVERNMENT, HOWEVER, NO MORE POLLS, IN THIS CASE ANYHOW, AND I THINK THAT HAS BEEN RECOGNIZED BY THE GOVERNMENT AS BEING THE POSITION WHICH WE ARE ALL IN.

BUT I WILL, AT THE APPROPRIATE TIME, LET ALL OF THIS BE AVAILABLE. I AM NOT GOING TO DO IT NOW BECAUSE I AM SATISFIED THAT NOTHING

WAS DONE THAT WOULD COMPROMISE THE INTEGRITY OF THE JURY.

SO, JUST FOR YOUR INFORMATION, NO MORE POLLING, AND THE RESULTS WILL ULTIMATELY BE MADE AVAILABLE IN CASE ANYBODY WANTS TO PURSUE IT AT A LATER DATE, BUT IT HAS NOTHING TO DO WITH THE TRIAL AS FAR AS I AM CONCERNED.

MR. COLE: VERY WELL, YOUR HONOR. WE WILL ABIDE BY THAT.

THE COURT: O.K.

MR. COLE: JIM COLE.

THE COURT: OKAY. THE OTHER PROBLEM RELATES TO THE [p. 7] STATUS OF THE TRANSCRIPT. AS I UNDERSTAND, THE GOVERNMENT HAS PROVIDED TO THE DEFENDANTS A TRANSCRIPT OF THE PORTIONS OF THE TAPES THAT WILL BE PLAYED, AND HAVE GIVEN COMPLETE TAPES TO THE DEFENDANTS, IS THAT CORRECT?

A VOICE: WE GAVE COMPLETE TAPES TO THE DEFENDANTS, THAT IS CORRECT.

THE COURT: ALL RIGHT. AND TRANSCRIPTS OF THOSE PORTIONS THAT WILL BE USED.

A VOICE: WE INITIALLY GAVE THEM ROUGH TRANSCRIPTS OF THE ENTIRE TAPES AND WE HAVE SINCE GIVEN THEM THE REDACTED TRANSCRIPTS THAT WE INTEND TO USE.

THE COURT: O.K.

MR. CAPITELLI: IF I MIGHT ADD, I TRIED TO GET UP AS CLOSE TO THE PHONE HERE, AS TO THE POLL INFORMATION, – THIS IS RALPH CAPITELLI, SPEAKING ON BEHALF OF THE JUDGE.

THE COURT: YES.

MR. CAPITELLI: JUDGE, IN CONNECTION WITH THE POLL, I HAD MENTIONED TO YOUR CLERK THAT I WANTED TO KNOW WHETHER OR NOT WE WERE GOING TO GET ACCESS TO IT BECAUSE WE ALSO WANTED TO REVIEW IT TO SEE IF WE WOULD BE ABLE TO, IF IT'S APPROPRIATE, TO ADD IT OR HAVE IT OFFERED AS A PROFFER IN CONNECTION WITH THE MOTION TO DISMISS WHICH YOU HAVE NOW RULED ON BUT HAD NOT RULED ON AT THE TIME THAT I MADE THAT REQUEST OF YOUR CLERK.

THE COURT: YES.

[p. 8] MR. CAPITELLI: WE STILL WANTED TO LOOK AT IT IN CONNECTION WITH THAT PURPOSE, AS WELL AS THE PURPOSE OF SEEING IF THE TAINT OF THE JURORS WHO WERE QUESTIONED WHO YOU ARE GOING TO EXCLUDE EXTEND POTENTIALLY TO OTHER PEOPLE THROUGH THE QUESTIONS THAT WERE ASKED AND THE ANSWERS THAT WERE SOLICITED.

ADDITIONALLY, WE DON'T KNOW AT THIS POINT IF THE SAMPLE THAT WAS SELECTED BY THE POLLSTER OR THE GOVERNMENT WAS REPRESENTATIVE OF THE RACIAL SAMPLE IN THE EASTERN DISTRICT, AND IF IT WAS NOT REPRESENTATIVE OF THE RACIAL SAMPLE, THEN YOUR DECISION TO

EXCLUDE THOSE JURORS WHO HAVE BEEN POLLED COULD HAVE POTENTIALLY AN ADVERSE EFFECT IN A DISPROPORTIONATE WAY RACIALLY IF THEIR SURVEY OR IF THEIR SAMPLE WAS NOT PROPERLY RACIALLY WEIGHTED, WHICH I HAVE NO IDEA IF IT WAS OR WASN'T.

THE COURT: WELL, MY UNDERSTANDING IS THAT NONE OF THE MEMBERS OF THE VENIRE GROUP HAVE – WERE POLLED.

MR. COLE: THAT'S OUR UNDERSTANDING AS WELL, YOUR HONOR. THIS IS JIM COLE.

THE COURT: YES. AND THAT, OF COURSE, CAN BE VERIFIED, MR. CAPITELLI, AT SOME FUTURE TIME.

I DON'T THINK IT'S AN ISSUE AT THIS TIME. I REALLY DON'T.

A VOICE: HAVE YOU MADE A DECISION, JUDGE, AS TO WHEN YOU ARE GOING TO LET US SEE THAT?

[p. 9] THE COURT: AFTER THE TRIAL. AFTER THE TRIAL.

A VOICE: AFTER THE TRIAL?

THE COURT: YES. IF YOU WANT IT FOR FURTHER PROCEEDING PURPOSES, FINE. I DON'T THINK IT HAS ANY – CAN HAVE ANY POSSIBLE IMPACT UPON THE SELECTION OF THE JURY IN THIS CASE.

I WILL VOIR DIRE THEM TO MAKE CERTAIN THAT NO ONE THERE HAS BEEN CALLED OR

KNOWS ANYONE WHO HAS BEEN CALLED OR HAS DISCUSSED IT.

I WILL DO THAT. AND I THINK IF THAT TURNS OUT TO BE A NEGATIVE ANSWER, I DON'T SEE THAT IT HAS ANY IMPACT UPON IT.

I DON'T APPROVE OF THE PROCEDURE. I HAVE MADE THAT CLEAR.

I THINK IT SIMPLY RAISES COMPLICATIONS, SUCH AS THE ONE WE ARE HAVING HERE, BUT FOR PURPOSES OF ANY MOTION AT THIS TIME, I DON'T THINK IT HAS ANY MERIT.

IF IT'S SOMETHING THAT YOU WISH TO PRESERVE FOR YOUR APPEAL PURPOSES, CERTAINLY YOU HAVE EVERY RIGHT TO DO THAT AND I WILL GIVE YOU EVERY RIGHT TO DO IT.

BUT I DON'T THINK IT HAS ANYTHING TO DO WITH THE CASE AT THIS TIME.

MR. GARCIA: JUDGE, THIS IS SONNIE GARCIA. I ASSUME YOU HAVE LOOKED AT IT IN CAMERA. IS THERE ANY POSSIBILITY, JUDGE, THAT EVEN THOUGH WE EXCLUDE THOSE JURORS THAT MIGHT [p. 10] HAVE BEEN QUESTIONED, OR EVEN HEARD OF THE POLL, IS THERE ANY POSSIBILITY THAT THE GOVERNMENT NOW HAS A PROFILE WHICH IT HAS DEVELOPED ON THAT CROSS SECTION WHICH WOULD ENABLE THEM TO DETERMINE WHICH JURORS OF THE NEW GROUP THAT WOULD MOST LIKELY BE ASKED TO VOTE IN A PARTICULAR WAY.

THE COURT: WELL, FROM MY REVIEW OF IT, THE GOVERNMENT GOT NOTHING. I DON'T THINK

THERE IS ANY OVERVIEW OF ANY KIND THAT WOULD POSSIBLY BE SEEN AS A POSSIBILITY ARISING OUT OF THIS.

SOMEBODY ELSE MAY LOOK AT IT DIFFERENTLY. I DON'T KNOW.

BUT I THINK IT'S A RED HERRING AT THIS TIME, AND I DON'T INTEND TO LET IT CLOUD UP THE ISSUES THAT REALLY ARE INVOLVED IN THIS CASE.

MR. COLE: JUDGE, THIS IS JIM COLE. AS WE STATED IN COURT, THAT'S OUR VIEW OF THE MATTER AS WELL. WE DIDN'T GET ANYTHING FROM THIS THAT'S IN ANY WAY USEFUL.

THE COURT: AND, AS I SAY, IF THE DEFENDANTS THINK AT A LATER TIME, IF IT BECOMES NECESSARY TO MAKE AN ISSUE OF IT, CERTAINLY YOU HAVE EVERY RIGHT TO DO SO AND YOUR RECORD WILL HAVE BEEN PERFECTED TO ENABLE YOU TO DO SO.

BUT I DON'T SEE IT HAS ANYTHING TO DO WITH THE CASE AT THIS TIME.

MR. MURRAY: JUDGE, JULIAN MURRAY SPEAKING.

THE COURT: YES.

[p. 11] MR. MURRAY: YOUR HONOR HAS RULED. WE DON'T WANT TO BE BEATING A DEAD HORSE, BUT I WOULD LIKE TO AT LEAST, YOU KNOW, MAKE THE SUGGESTION THAT WE REALLY ELIMINATE ALL THE POSSIBLE PROBLEMS IF WE ARE GIVEN THE POLL, WHATEVER THE GOVERNMENT HAS, THEN

WE HAVE THE SAME THING. I DON'T SEE WHAT IT COULD HURT.

THE CONVERSE IS THAT WE GET IT AFTER THE TRIAL AND THEN WE HAVE SOMEBODY LOOK AT IT WHO CAN READ SOME SUBTLETIES IN IT THAT MAYBE YOU AND I COULDN'T SEE AND THAT SEEMS TO ME PRESENTS PROBLEMS IF WE GET IT AFTERWARDS. IF WE COULD GET IT BEFORE, I AM JUST KIND OF MISSING WHY WE WOULD DO ANY HARM IF WE GOT IT NOW.

THE COURT: IT WILL TAKE UP YOUR TIME THAT SHOULD BE DEVOTED TO MORE IMPORTANT ISSUES FOR ONE THING. I REALLY THINK, AS I SAY, I THINK IT'S A RED HERRING OF THE FIRST ORDER.

AND I DON'T SEE THAT IT HAS ANYTHING TO BE – I DON'T THINK ANYBODY COULD SEE – FIND ANYTHING THAT WOULD BE PREJUDICIAL TO THE DEFENDANTS IN THIS CASE. I REALLY DON'T.

A VOICE: ALL RIGHT, JUDGE. WELL, WE JUST –

THE COURT: I UNDERSTAND.

A VOICE: PERHAPS WE SHOULD NOTE OUR OBJECTION. I DON'T THINK WE HAVE A FORMAL MOTION BEFORE THE COURT, EXCEPT YOUR HONOR'S RULING. MAYBE IT'S APPROPRIATE FOR US TO NOTE THAT WE DO OBJECT TO NOT HAVING IT BEFORE WE SELECT THE JURY.

[p. 12] THE COURT: IT JUST ADDS ANOTHER OAR TO YOUR GROUP, AND I DON'T LIKE THAT, BUT THAT'S THE WAY IT GOES. OKAY.

A VOICE: FINE, JUDGE.

THE COURT: ALL RIGHT. THE OTHER THING THEN I WAS TALKING ABOUT WAS THE TRANSCRIPTS ON THE TAPES. AS I UNDERSTAND, AND AS I INDICATED, THE GOVERNMENT HAS GIVEN REDACTED TRANSCRIPTS OF THE PORTIONS OF THE TAPES THAT THEY ARE GOING TO USE. THEY HAVE GIVEN COMPLETE TAPES, WHETHER THEY ARE GOING TO USE IT OR NOT.

AND THE DEFENDANTS HAVE REQUESTED THAT ALL TAPES BE PLAYED IN THEIR ENTIRETY. I AM NOT GOING TO DO THAT.

IF THE DEFENDANTS WANT TO USE ANY PORTIONS OF THEM, THEY, OF COURSE, MAY DO SO. BUT I HAVE AGAIN REVIEWED MUCH OF THE DATA ON THE TAPE.

A LOT OF IT IS CERTAINLY UNRELATED TO THIS CASE, UNRELATED TO ANYTHING, AND THE DEFENDANTS, AS FAR AS I AM CONCERNED, HAVE RECEIVED ALL THAT THEY ARE ENTITLED TO RECEIVE AT THIS TIME AS A RESULT OF THE TAPES AND THE TRANSCRIPTS.

MR COLE: YOUR HONOR, THIS IS JIM COLE. THE ONLY ADDITION I WOULD MAKE TO THAT IS THAT THERE MAY BE SECTIONS OF THOSE TAPES THAT WE WOULD LIKE THE OPPORTUNITY TO OBJECT TO ON RELEVANCY GROUNDS.

THE COURT: OH, I AM SURE THAT YOU WILL OBJECT TO IT, AND I ASSUME THE DEFENDANTS WILL BE OBJECTING TO SOME

APPENDIX C

USA Plaintiff	CRIMINAL/CIVIL ACTION
versus	No. 91-35
Collins Defendant	SECTION _____

SEALED

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	*	CRIMINAL NO. 91-035
V.	*	(Filed Oct. 17, 1991)
ROBERT COLLINS and JOHN H. ROSS	*	

James M. Cole, Esquire, Deputy Chief, United States Attorney, Public Integrity Section, Department of Justice, Washington, D.C., John M. Campbell, Esquire, Assistant United States Attorney, Public Integrity Section, Department of Justice, Washington, D.C., and Raymond N. Hulser, Esq., Assistant United States Attorney, Public Integrity Section, Department of Justice, Washington, D.C., counsel for plaintiff.

Ralph Capitelli, Esquire, New Orleans, Louisiana, Julian Murray, Esquire, New Orleans, Louisiana, and Kern Reese, Esquire, New Orleans, Louisiana, counsel for defendant Collins. Sonny Garcia, III, Esquire, Metairie, Louisiana, and Frank J. Uddo, Esquire, New Orleans, Louisiana, counsel for defendant Ross.

Young, Joseph H., Senior United States District Judge.

Date: October 14, 1991

MEMORANDUM

Defendants Robert F. Collins and John H. Ross move the Court for a new trial pursuant to Federal Rule of

Criminal Procedure 33. After a hearing and careful consideration of the memoranda submitted in support of this motion, the Court denied the motion in open court on September 5; and now sets forth in more detail the legal reasoning for the denial. The Court finds that the Public Opinion Survey Poll challenged by Defendants did not taint the Jury nor did it prejudice the Defendants, that foreperson Turner did not mislead the Court on *voir dire*, that the jury instruction on entrapment was proper, and that the Prosecutor's comments made during closing arguments were appropriate and did not prejudice the Defendants.

Standard of Review

A motion for new trial pursuant to Rule 33, Fed. R.Crim.P., is addressed to the sound discretion of the trial judge. *United States v. Antone*, 603 F.2d 566 (5th Cir. 1979); *United States v. Riley*, 544 F.2d 237 (5th Cir. 1976), *cert. denied*, 430 U.S. 932, 97 S.Ct. 1554 (1977); *Hudson v. United States*, 387 F.2d 331 (5th Cir. 1967), *cert. denied*, 393 U.S. 876, 89 S.Ct. 172 (1968). In order to prevail upon a Rule 33 motion, a defendant must ordinarily show that the grounds for the motion (1) were newly discovered and unknown to the defendants at the time of the trial; (2) are material, not merely cumulative or impeaching; (3) would probably produce an acquittal; and (4) that failure to learn of the grounds was due to no lack of diligence on the part of the defendants. *Antone*, 603 F.2d at 569; *United States v. Rachal*, 473 F.2d 1338, 1343 (5th Cir.), *cert. denied*, 412 U.S. 927, 93 S.Ct. 2750 (1973), and *cert. denied*, 412 U.S. 927, 93 S.Ct. 2757 (1973).

Facts

On June 29, 1991, Defendants were tried and convicted on a three-count criminal indictment. The charges included bribery in violation of 18 U.S.C. 201(b)(2), obstructing justice in violation of 18 U.S.C. 1503, and defrauding the United States in violation of 18 U.S.C. 371.

On July 22, 1991, Defendant Collins and Defendant Ross moved the Court for a new trial pursuant to Federal Rule of Criminal Procedure 33. Defendants presented five basic arguments as grounds for relief: (1) the public opinion survey commissioned by the Government before trial violated Defendants' Fifth and Sixth Amendment rights; (2) the Government's use of its peremptory challenges violated the equal protection principles enunciated in *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712 (1986); (3) foreperson Turner misled the Court on *voir dire* and made statements that were prejudicial; (4) the jury instruction on the issue of entrapment was inadequate; and (5) during closing argument, the prosecution commented on Defendant Collins' failure to testify in violation of his Fifth Amendment Rights.

I. The Public Opinion Survey

On May 16, 1991, Defendants informed the Court that the Government was conducting a telephone survey pertaining to this case. The Court immediately ordered the Government to terminate all polling and to turn over to the Court the survey, and findings, for an *in camera* review. After reviewing the method and results of the survey, it was determined that the polling method and results could not harm the integrity of the jury to be

selected and did not prejudice the Defendants; and if produced to the Defendants, the survey would raise issues that would unnecessarily complicate the proceedings. In essence, the survey was a red herring of the first order. Accordingly, the Court denied Defendants' request for this material. Defendants were provided with the poll and results after trial for the purpose of post trial motions and subsequent right to appeal.

A. Use of the Survey By The Government

Defendants now argue that the survey and its use by the Government denied them their due process rights and their right to an impartial jury in violation of the Fifth and Sixth Amendments of the Constitution. First, Defendants argue that through pre-trial polling, the Government spread its view of the evidence throughout the Eastern District of Louisiana," and accordingly, the jury was not an impartial one and not able to "decide the case solely on the evidence before it." *McDonough Power Equipment Inc. v. Greenwood*, 464 U.S. 548, 554, 104 S.Ct. 845, 849 (1984). Defendants also argue that the survey results permitted the Government to "tailor[] their evidence to the poll answers," so as to "procure" a conviction. *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S.Ct. 340, 342 (1935).

(1)

The limited reach of the survey dispels any notion that, through the poll, the Government was able to "spread its view." The survey contacted 457 people in the Eastern District of Louisiana. Survey questions were specifically confined to that which was already public

record, as a result of either the indictment or Defendants' own statements.

Any possibility that the jury would be tainted was eliminated by questions posed by the Court during *voir dire.*[1] *McDonough Power Equipment, Inc. v. Greenwood,* 464

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[1] THE COURT: The next question is do any of you recall having read anything about this case, the nature of the charges, any information about the case, read it in the newspapers, heard anything about it on television, anything that you recall having read or heard about the case?

All right. What I'm going to ask you, then, those of you who have, just go down the rows. Tell us if you've read about it, heard about it on the television. Don't give all of the details of what it was that you heard or read, but just that you did, and if you can give a time frame whether it was within the last week or two or two months, whatever. So beginning to my left,

[Several jurors gave their responses.]

THE COURT: Those of you who have read something about the case, heard something about it on radio, on television, has anything occurred as! a result of that that would prevent you from returning a verdict in this case based solely upon the evidence you hear in Court and the instructions I give to you?

In other words, have you made up your mind about it one way or another? Have you resolved any of the issues? Is there anything that would prevent you from deciding this case based solely upon the evidence you hear in court and the instructions I give to you?

If your answer is no, you need not respond. If your answer is yes, I would like to see a show of hands.

U.S. 548, 554, 104 S.Ct. 845, 849 (1984) ("*Voir dire* examination serves to protect [the right to an impartial jury] by exposing possible biases, both known and unknown, on the part of potential jurors.") Accordingly, there was no evidence that the Government spread its view of the evidence to the people of the Eastern District of Louisiana, nor did the survey "infect" the jury.

(2)

Defendants' allegation that the survey results permitted the Government to "tailor the evidence" to "procure" a conviction is also meritless. According to Defendants, the responses to a specific set of questions – questions F3-F19 – permitted the Government to form a "profile" of jurors favorable to the Government and to tailor their arguments to fit the predispositions of the jurors. Defendants have produced no evidence that the Government

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[Jurors responding yes were struck for cause.] Tr. *voir dire*, pg 51-65.

THE COURT: Other than those who have just responded to the last question, do any of the members of the panel have an opinion as to the guilt or the innocence of any of the Defendants of the charges contained in the Indictment at this time or have you ever expressed an opinion as to the guilt or the innocence of any of the Defendants?

(Whereupon, no response from the prospective jurors.)

THE COURT: I note no response.

Has anyone talked to you about this case? In other words, has anybody *called you on the telephone, anybody trying to poll any of you*, make a telephone call to you, talk to you about the case, discuss the case with you in any way? . . .

(Whereupon, no response from the prospective jurors.)

ever received the responses to these questions.[2] The Government argues, and Defendants' expert pollster (Mr. Walker) confirms, that the data the Government did have was useless without the missing background and demographic data obtainable through those questions. Contrary to Defendants' contention, therefore, the poll was not developed to the point of revealing a juror profile that would be of any use to the Government's case.

With regard to the survey results that *were* turned over to the Government, the Court is satisfied that although a survey of community attitudes may aid a party in deciding what to *emphasize* at trial, our adversarial system with its liberal discovery mechanisms, does not permit a party to "contrive" a conviction that is not based on the evidence. There is no evidence that the Government manufactured or "tailored" evidence based on the survey. The Court will deny Defendants' Motion for a New Trial based on this ground.

B. Suppression of The Survey: Brady Material

Defendants argue that the survey results were *Brady* material that was suppressed by the Court in violation of

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[2] The Government maintains that polling stopped pursuant to Court order, and that the Government made no use of the survey. The answers to questions F3-F19 (referred to as "background and demographic data") were never produced. At the post-trial hearing on this motion, Dr. McConahay, the Government's pollster, produced a computer print out of "raw data" pertaining, *inter alia*, to questions F3 - F19. The print out consisted of an unintelligible series of numbers and symbols. Dr. McConahay testified that pursuant to Court Order, the raw data was never compiled nor provided to the Government.

Defendants' Fifth and Sixth Amendment rights. *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194 (1963) holds that suppression by the Government of evidence favorable to the accused, and "material either to guilt or innocence," amounts to a denial of due process. *Id.* at 87. Implicit in the requirement of materiality under both *Brady* and Rule 33, Fed.R.Crim.P. is a concern that the suppressed evidence might have effected the outcome of trial. *United States v. Agurs,* 427 U.S. 97, 104, 96 S.Ct. 2392, 2397 (1976); *United States v. Antone,* 603 F.2d 566 (5th Cir. 1979). Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *United States v. Bagley,* 473 U.S. 667, 682, 105 S.Ct. 3375, 3383 (1985). A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id. See, James v. Whitley,* 926 F.2d 1433, 1439 (5th Cir. 1991); *United States v. McKenzie,* 768 F.2d 602, 610 (5th Cir. 1985), *cert. denied,* 474 U.S. 1086, 106 S.Ct. 861 (1986).

Witholding [sic] information is also criticized under *Brady* if the withheld information causes a defendant to alter his strategy in a way that prejudices the defense. *United States v. Bagley,* 473 U.S. at 683, 105 S.Ct. at 3384 (*Bagley* evidences concern with "any adverse affect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case."); *Smith v. Black,* 904 F.2d 950, 967 n.4 (5th Cir.), reh. denied, 912 F.2d 1465 (5th Cir. 1990). The standard of materiality is the same, "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley,* 473 U.S. at 682, 105 S.Ct. at 3383.

Defendants urge that the survey and results were information that, if disclosed to the defense prior to trial, would have caused defense counsel to significantly alter their trial strategy creating a reasonable probability that the outcome would have been different. Defendants allege that nondisclosure (1) put them at a disadvantage *vis a vis* the Government in preparing for trial; (2) denied them an opportunity to move for change of venue and/or severance; (3) unconstitutionally limited their right to *voir dire;* and (4) misled them into consenting to give the Government additional peremptory challenges.

(1)

Satisfied that the poll had no significant impact on the Government's ability to prepare for trial (see discussion, infra), the Court finds that Defendants' first allegation of prejudice is without merit.

(2)

Rule 21(a) of the Federal Rules of Criminal Procedure provides that the Court, upon motion of a defendant, shall transfer a case to another district "if the Court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that the defendant cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district." Fed. R. Crim. P. 21(a). The district court is not, however, required to move a trial absent a strong showing of prejudice. *See United States v. Malmay,* 671 F.2d 869, 879 (5th Cir. 1982) (citing *Irvin v. Dowd,* 366 U.S. 717, 722-23 (1961)).

Defendants contend that the results of the poll showed a community bias, and, had they known of the survey results, they "certainly would have asked to have this case transferred.[3] The appropriate mechanism for screening jurors to avoid bias is through *voir dire* examination. *United States v. Malmay*, 671 F.2d 869, 876 (5th Cir. 1982) (citing *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639 (1961)). "The Constitution does not entitle a criminal defendant to a trial by a body of jurors ignorant of all facts surrounding a case, but only an impartial jury that will render a verdict based exclusively on the evidence presented in the court." *Id.* at 876. In this case, the Court knew of the survey and thoroughly reviewed the survey and results in advance of *voir dire* examination. During *voir dire*, the Court directed several questions toward rooting out bias, if any, caused by the survey.[4] Based on *voir dire* examination and the fact that the survey reached only 457 people, the Court is satisfied there was no jury bias. Defendants received a fair trial with an impartial jury capable of rendering a verdict based solely upon the evidence and the applicable law.

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[3] Fifty-seven percent of those answering the survey knew of the Collins case. Of that 57%, ninety percent (50.8% of the total number surveyed) felt that Collins was probably or definitely guilty, with the vast majority in the "probably guilty" category. Ninety-five percent of those answering (55.6% of the total surveyed) believed that Ross was probably or definitely guilty, again with the vast majority of those in the "probably guilty" category. Furthermore, the responses fluctuated dramatically according to the information provided.

[4] *See supra* note 1.

(3)

Defendants maintain that if they had known of the survey results, they would have requested and argued vehemently for an extensive, specific and incisive *voir dire* on the issue of "defendants' having to prove themselves innocent."[5] The Court asked the venire panel whether they would be able to decide the case solely on the evidence and the law as instructed by the Court. Transcript of *Voir Dire*, at 119, 120, 122, 126 and 127. The Court also examined the jury on the legal requirements of the presumption of innocence and the burden of proof. Transcript of *Voir Dire*, at 30-31. There has been no showing that the jury was unable to follow those instructions. Defendants cite no authority indicating that they would be entitled to additional *voir dire*.

(4)

Finally, Defendants contend that if they had known of the poll and its results, they would have strenuously objected to giving the prosecution additional peremptory challenges. *See United States v. Bruno*, 873 F.2d 555, 560-561 (2nd Cir.), *cert. denied*, ___ U.S. ___, 110 S.Ct. 125, 107 L.Ed.2d 86 (1989). The granting of an additional challenge to the Government does not require reversal of a

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[5] In their motion, Defendants suggest that they would have requested extensive *voir dire* on "various issues" set forth in the poll. The Court will address only the specific issue raised by Defendants dealing with the question of "defendants having to prove themselves innocent." As for any other issues raised by the poll, prejudice caused by the poll, if any, was eliminated during *voir dire* examination.

conviction where the defendant fails to show any prejudice. *See, United States v. Gleason,* 616 F.2d 2, 29 (2nd Cir. 1979), *cert. denied,* 444 U.S. 1082, 100 S.Ct. 1037 (1980).

Defendants have not shown prejudice. There has been no evidence that the jury was biased or unrepresentative or that the prosecution exercised its challenges in violation of *Batson*. As discussed above, the raw data was useless to the Government since the background and demographic data could not be correlated with the other information contained in the poll results. Accordingly, with respect to the peremptory challenges, the number of strikes available to the Government was inconsequential as it relates to the survey.

The Court withheld the survey and provided the information only after trial, for post-trial and appeal purposes, for two reasons. First, after a careful review of the survey, it was apparent that the "results" would have no impact upon the selection of the jury, nor prejudice the Defendants in any way. Second, the Court was concerned that if any details of the survey were publicized at that time, jury selection would be difficult because misunderstandings based on the results of the poll could taint the entire panel. The degree to which the Defendants may have altered their trial strategy if the information had not been withheld does not rise to the level of constitutional error under *Brady v. Maryland*.

II. Defendants' *Batson v. Kentucky* Challenge

Following jury selection but prior to the jury being empaneled, Defendants moved for a mistrial pursuant to *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d

69 (1986), arguing that the Government's use of peremptory challenges against black members of the venire violated their equal protection rights. The Court denied that motion. Later, during a recess of the trial, the Court held a hearing at which time the Government stated its reasons for the exercise of its peremptory challenges, and Defendants were given an opportunity to challenge those reasons. On July 5, 1991, the Court issued a written opinion on the *Batson* claim.

In the present motion, Defendants have renewed their *Batson* claim and now argue that the Court's procedures for handling objections to the Government's exercise of peremptory strikes prejudiced their ability to develop a record in support of that claim. The Defendants were given ample opportunity to establish a *prima facie* case of purposeful discrimination, and failed to meet their burden. For the reasons set forth below, the Court will deny Defendants' Motion for a New Trial on this ground.

A. The Law

In its memorandum opinion denying Defendants' first motion for a new trial, the Court outlined the law under *Batson*:

> In *Batson*, the Supreme Court held that "[t]he equal protection clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Id.* at 89, 106 S.Ct. at 1718. *See United States v. Leslie*, 813 F.2d 658, 659 (5th Cir.

1987) (incorporating the Fourteenth Amendment protection of *Batson v. Kentucky*.) Thus, a prosecutor may peremptorily strike a minority juror only if a racially neutral basis for the challenge can be established.

Under *Batson*, "the showing necessary to establish a *prima facie* case of purposeful discrimination" consists of three elements. First, a defendant "must show that he is a member of a cognizable racial group . . . and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race." Second, a defendant can rely on the fact that peremptory challenges may disguise racial discrimination. Finally, "the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race." *United States v. Forbes*, 816 F.2d 1006, 1010 (5th Cir. 1987). Once a defendant has made a prima facie showing that the prosecutor's strikes were racially motivated, the burden shifts to the Government "to come forward with a neutral explanation for challenging" the jurors of the defendant's race. *Batson*, 476 U.S. at 97, 106 S.Ct. at 1723.

B. Alleged Procedural Error

Defendants argue that they were not permitted to develop a record of purposeful discrimination before the venire was dismissed and the jury sworn. *See United States v. Dawn*, 897 F.2d 1444, 1448 (8th Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 389, 112 L.Ed.2d 400 (1990) ("the district court, before the venire is dismissed and the jury

is sworn, must give the defendant a reasonable opportunity to [develop a record]"). The prosecution was permitted to put its explanations on the record and thus review on appeal will be limited to the record – *United States v. Forbes*, 816 F.2d 1006, 1010 (5th Cir. 1987) – a record which Defendants argue they were not permitted to develop.

Defendants were given ample opportunity to develop a purposeful record of discrimination. Following *voir dire* examination, Defendants noted their objection to the Court's method of exercising peremptory challenges.[6] That objection was premature as neither side had exercised any peremptory challenges, and no showing of a *prima facie* case of discrimination could be made. The Court then called for a brief recess at which time each side exercised its peremptory challenges. When court resumed, the jury was selected. The Court then asked each side whether the jury was acceptable.

THE COURT:	Is the jury acceptable to the Government?
MR. COLE:	Yes, Your Honor.
THE COURT:	Is the jury acceptable to the Defendant Collins?

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[6] "We want to note an objection to the Court's method of allowing each side to strike the jurors and the reason we do that is it relates to the *Batson* decision, Judge. We feel that when each side is required to exercise their challenges altogether without the other side seeing them and without the challenges being able to be evaluated vis-a-vis what the other ones are doing, we think destroys part of our ability to make any meaningful *Batson* challenges." Transcript of *Voir Dire*, June 17, 1991.

MR. MURRAY: Subject to the matters we discussed with the Court *that we can out on the record later.*

THE COURT: Yes I understand. The Defendant Ross?

MR GARCIA: The same situation.

THE COURT: Thank you. Swear the jurors, please. [At which time the venire was dismissed]

Transcript of *Voir dire,* at p. 162-163, June 17, 1991. (emphasis supplied).

The Defendants were given an opportunity to develop the record before the venire was dismissed, but elected to wait.

After the jury was dismissed, Defendants entered their challenge under *Batson.*

MR. MURRAY: We note and the Court can, I believe, take judicial notice that the makeup of black to white jurors in the district is approximately 26 percent. It turned out that the makeup of the jury panel this morning was approximately 26 percent, and interestingly enough, when various challenges for cause were granted by the Court, the remaining ratio of jurors black to white was approximately 26 percent, but yet out of the eight challenges which the Government was given, six of those challenges

were for blacks, so *three-quarters of the Government's challenges were devoted to black citizens and one-quarter of the citizens of the District and one-quarter of the jury venire in round figures were made up of blacks and we think that is a prima facie challenge under Batson,* that the Government's selection of the Jury was in violation of the United States Constitution, and for that reason the Defense, on behalf of Robert Collins, moves for a mistrial.

MR. GARCIA: Your Honor, the same motion on behalf of Mr. Ross and I don't need to repeat it.

Transcript of *voir dire,* at 169-170. (emphasis supplied).

The Court found that Defendants had not met their burden, and denied the motion. *See, United States v. Dawn,* 897 F.2d 1444, 1448 (8th Cir. 1990) ("a defendant who requests a prima facie finding of purposeful discrimination is obligated to develop a record, *beyond numbers,* in support of the asserted violation.") (emphasis supplied).

Defendants challenge the procedures outlined above as being contrary to the *Manual on Recurring Problems in Criminal Trials, Federal Judicial Center,* at 29-30 (3rd. Ed. 1990), (hereinafter "the Manual"). The procedures outlined in the Manual are admittedly *suggestions* and not law. The purpose of the procedure in the Manual is to make the record secure for a subsequent *Batson* challenge.

The record in this case is secure. Defendants based their *Batson* challenge on the numbers. The Government put its reasons on record and Defendants were given an opportunity to challenge them as pretextual. The Court addressed its reasons for denying the Defendants' – *Batson* challenge – as it pertained to each struck juror – in a formal Memorandum Opinion dated July 5, 1991. The policy behind the procedures outlined in the Manual has been satisfied. Defendants' challenge based on *Batson v. Kentucky* is meritless.

C. Substantive Claim

The Court's reasons for denying Defendants' substantive *Batson* challenge to the Government's use of peremptory challenges have been set forth in great detail in the Court's Memorandum Opinion dated July 5, 1991 and will not be repeated here.

For the reasons stated in Part I, Defendants' *Batson* challenge based on the Public Opinion Survey is meritless.

III. Jury Misconduct

Defendants contend that a member of the jury, Ms. Turner, deliberately misled the Court during *voir dire* examination by answering that she could fairly and impartially decide this case. Defendants offer the testimony of venireperson number 4, Mr. Smith, that during *voir dire,* Ms. Turner stated "Why don't they go ahead and plead guilty. We can all go home because they both look guilty."

In evaluating a claim of juror misconduct, the Court must begin with the presumption that the jury was impartial; it is up to the defendants to prove otherwise by a preponderance of credible evidence. *United States v. Wayman*, 510 F.2d 1020, 1024 (5th Cir.), *cert. denied*, 423 U.S. 846, 96 S.Ct. 84 (1975); *United States v. Robbins*, 500 F.2d 650, 653 (5th Cir. 1974). The party alleging misrepresentation by a juror must first demonstrate that the juror failed to answer honestly a material question on *voir dire*, and then further show actual bias. *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 104 S.Ct. 845 (1984); *United States v. Scott*, 854 F.2d 697 (5th Cir. 1988); *United States v. Perkins*, 748 F.2d 1519 (11th Cir. 1984).

Ms. Turner flatly denies, through her affidavit and FBI interview report, having made any statement about the guilt or innocence of the Defendants during *voir dire*. She also states in her affidavit that she answered the Court's questions truthfully when she stated that she had no prejudice toward the defendants. A juror's statement is strong evidence on the question of whether the juror has lived up to his or oath to remain unbiased. *Smith v. Phillips*, 455 U.S. 209, 217 n.7, 102 S.Ct. 940, 946 n.7 (1982). *See United States v. Robbins*, 500 F.2d 650, 653 (5th Cir. 1974) (district court entitled to credit the unequivocal testimony of juror that she was not biased).

IV. Entrapment Defense

Defendant Ross contends that the jury was instructed improperly on his defense of entrapment. The jury instruction followed the standard Fifth Circuit charge approved in several cases. *See United States v. Martinez*,

894 F.2d 1445, 1450 (5th Cir.), reh. denied, 901 F.2d 110, *cert. denied*, ___ U.S. ___, 111 S.Ct. 351, 112 L.Ed.2d 315 (1990); *United States v. Johnson*, 872 F.2d 612, 622 (5th Cir. 1989), reh. denied, 880 F.2d 413 (5th Cir. 1989).

V. Prosecutorial Misconduct

Defendants argue that Prosecutor Cole commented, during closing argument, on Defendant Collins' failure to testify, contrary to the Fifth Amendment's prohibition. *Griffin v. California* 380 U.S. 609, 85 S.Ct. 1229 (1965), reh. denied, 381 U.S. 957, 85 S.Ct. 1797 (1965); *United States v. Bright*, 630 F.2d 804, 825 (5th Cir. 1980); *United States v. Borchardt*, 809 F.2d 1115, 1119 (5th Cir. 1987).

"Comment on a defendant's silence is reason for reversal only if the speaker's manifest intention is to focus on that silence *or* the remark was such that a juror would naturally and necessarily take it as a comment on the defendant's failure to testify." *United States v. Garcia*, 655 F.2d 59, 64 (5th Cir. 1981); *United States v. Jones*, 648 F.2d 215, 218 (5th Cir. 1981). The test is *not* met, however, "if some other explanation for his remark is equally plausible." *United States v. Rochan*, 563 F.2d 1246, 1249 (5th Cir. 1977) (Emphasis supplied). *Accord, United States v. Nabors*, 762 F.2d 642, 650 (8th Cir. 1985); *United States v. Carter*, 760 F.2d 1568, 1578 (11th Cir. 1985).

Defendants maintain that Mr. Cole was commenting directly on Defendant Collins' failure to testify when he made the following comment:

> There was already $16,000.00 in his chambers. He had already started spending it. And he won't tell anybody what it's for. If it's a real

> estate deal, tell us. He is a federal judge for 13 years. He signed search warrants himself for years. He's presided over these trials for years. Are you going to tell me that he isn't capable at the moment, if there is a reasonable, innocent, legitimate explanation, from saying "let me tell you what it's all about?" He knows how the system works. He knows that you can explain. But, no, Mr. Murray wants to create out of whole cloth in his own mind what happened. Transcript of Government's Closing Argument, at 5-6 (6/27/91).

Statements that might appear improper when considered in a vacuum may be found permissible when considered in context. Taken in context, the record bears out the Government's position that the remarks in question refer to Collins' failure to provide the innocent explanation that he presented at trial (a real estate transaction) for the $16,000 cash found in his office, on August 10, 1990, when it would have been natural to do so. The Government's argument on this point boiled down to this: if the cash was from a legitimate real estate deal (as counsel for both defendants told the jury in opening statements), then why didn't the defendants just say so on August 10? See Transcript of Closing Arguments, at 5-6, 9-10, and 23. The remark was clearly a comment on the plausibility of Defendant Collins' trial defense, not his failure to testify.[7]

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[7] A key aspect of the government's proof at trial was the defendants' own statements to interviewing agents on August 10, 1990, when the search warrants were executed and the forthwith subpoenas served. In these statements, both defendants affirmatively denied that Ross had given any cash to Collins for any reason at all, and each affirmatively denied having any current real estate or other dealings with the other.

Defendants' motion on grounds of prosecutorial misconduct is denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	*	
V.	*	CRIMINAL NO. 91-035
ROBERT COLLINS and JOHN H. ROSS	*	

ORDER

In accordance with the attached Memorandum, it is, this 14th day of October, 1991, by the United States District Court for the Eastern District of Louisiana, ORDERED:

1. That Defendants' Motion for a New Trial BE and the same is, hereby DENIED;

2. That a copy of the Memorandum and Order be mailed to counsel for the parties.

/s/ illegible
Senior United States District Judge

APPENDIX E

[p. 1] UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

THE UNITED STATES OF AMERICA	CRIMINAL ACTION NO. 91-35
V.	NEW ORLEANS, LOUISIANA
ROBERT F. COLLINS and JOHN H. ROSS	SEPTEMBER 6, 1991 (Filed Oct. 31, 1991)

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TRANSCRIPT OF SENTENCING HEARING
BEFORE THE HONORABLE JOSEPH H. YOUNG
UNITED STATES DISTRICT JUDGE (MARYLAND)

APPEARANCES:

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504/589-2797

Proceedings recorded by mechanical stenography, transcript produced by computer.

* * *

[p. 4] Friday, September 6, 1991, 10:00 A.M.

PROCEEDINGS

THE COURT: Good morning. Be seated, please. The case being called today is United States of America versus Robert R. Collins and John Ross.

The first matter, I think there was a motion for continuance of the sentencing hearing. I don't know if anybody wants to say anything on that.

MR. MURRAY: Your Honor, we would submit the matter, we briefed it. We would also point out that while we did not put it in our briefs, under the Sentencing Guidelines rule if there are contested issues of fact, as there are here, the procedure is for the Court to notify the

parties and give them an opportunity to respond in writing before the sentencing.

We do recognize that Your Honor in fact does travel down here, it is not like we could put these things off for a few days. But on the other hand, we believe it would be more orderly and appropriate if the sentencing were to be continued so we could have the objections ruled upon and the factors that are in conflict ruled upon and we could respond to them as outlined in the procedure.

THE COURT: Well, counsel did receive a copy of the presentence investigation, I believe, on August 23rd, you said in your memorandum. And I think there has been ample [p. 5] opportunity to respond to it.

We will address in a moment the objections that have been made to the report, but I think for all parties concerned in this case, for everyone's best interest the time has come for this case to rest at this level in any event. So the motion for continuance of sentencing will be denied and we will then proceed to the objections.

I have received from counsel for Defendant Collins and Defendant Ross the objections to certain portions of the presentence report. So who wants to speak first on those? Mr. Capitelli?

MR. CAPITELLI: Yes, Your Honor. Your Honor, I realize the primary matter deals with the cross-reference, but just to address the first issue I think that was –

THE COURT: You are not submitting on the others?

MR. CAPITELLI: No, I would just like to point out that I realize Mr. Osborne was not aware that the Court had ruled as it had on the hearsay statements prior to

January 29 and that because of the time sequence that got in late. I don't want to be unfair to Mr. Osborne, but I think those references to statements made prior to that should not appear in the presentence report.

THE COURT: They will not be considered by the Court in the sentencing, and I don't think they in any way have any impact on the Guidelines as such. But as far as [p. 6] having been made, they will not be considered. That's objection number one.

MR. CAPITELLI: Objection number two, Your Honor, in dealing with just the statement that, in fact, no such agreement or cooperation between the government existed –

THE COURT: I will note that that is an error. There was an agreement. Apparently the testimony, as I recall it, there was no cooperation or insufficient cooperation to justify AUSA Winters to write the letter that has been referred to.

MR. CAPITELLI: Yes.

THE COURT: So that was an error and I will make that note.

MR. CAPITELLI: Our primary objection is objection three dealing with the use of Section 2X3.1, the cross-over reference. Your Honor, in this instance this is truly probably the best example you will ever see of a situation that was, could not have possibly been contemplated by the Sentencing Commission. You have an accessory after the fact being penalized at a Guidelines offense for a pre-Guidelines charge which was negotiated, plea bargained, part of a government sting operation, and the accessory

after the fact which is delineated as clearly and throughout criminal law as a less serious offense than the substantive offense in the practical situation becomes a much more serious [p. 7] offense than the actual underlying charge that Gary Young faced and faces.

THE COURT: I agree, but I am not aware at this point specifically that is has been addressed as of this date, September 6, 1991, by any appellate court. I don't think you have –

MR. CAPITELLI: We have researched, couldn't find it.

THE COURT: I think everybody has. But there is some language in one of the cases, for example, where a state offense was considered. Now, that is not specifically referred to in the Guidelines, but a state offense was considered to justify the cross-reference, even though in the Guidelines procedure. That was in Oklahoma, I think, the Tenth Circuit.

MR. CAPITELLI: I'm not familiar with that case.

THE COURT: *Willis*, I think, is the case; I believe.

MR. CAPITELLI: I'm not familiar with that.

THE COURT: You are not familiar with it?

But what about the analogy one would make from a pre-Guidelines crime such as the underlying, the case here as opposed to considering as reason for enhancement of the cross-reference by the cross-reference statement; you see any analogy?

[p. 8] MR. CAPITELLI: Between the enhancement as accessory after the fact because of a prior underlying state offense?

THE COURT: Uh-huh.

MR. CAPITELLI: You could make the analogy, but I don't think it applies here because you have a situation where the base levels and the underlying offenses that are specifically laid out for all these offenses in detail, none of that applies in any state offenses. It may eventually.

THE COURT: That was the intent, I think, of the Guidelines and we are all critical of the Guidelines freely and openly from time to time. I'm sure you have been and most judges have been.

MR. CAPITELLI: Very much so.

THE COURT: Some of the Commissioners have been. But they're there and they are the law we will and we must follow. And however one looks at it, it does seem that the language was written or intended generally to cover matters that aren't specifically covered or addressed by language as such. And I think that is one of the good points of the Guidelines, is that there has been an effort to cover matters that aren't specifically addressed because of the broadness of the language. You may complain about it and I may, but I think it has the salutary purpose to that extent and there is – I am referring now to the Guidelines [p. 9] manual – there is some language that refers in the opening parts, referring now to Page 1.5, where it is suggested that – let me, I am quoting, "One of the most important questions for the

Commission to decide was whether to base sentences upon the actual conduct in which the defendant engaged, regardless of the charges for which he was indicted or convicted, or upon the conduct that constitutes the elements of the offense with which the defendant was charged and of which he was convicted." One is, of course, the real offense, the other is the charged offense.

Then it goes on to say, "For another, the Guidelines . . . take account of a number of important, commonly occurring real offense elements, such as role in the offense, the presence of a gun," referring to a bank robbery case, "the amount of money actually taken," through offense levels to specific offense characteristics cross-references and adjustments. It was through those procedures the Guidelines suggest that they have attempted to cover matters that aren't specifically referred to.

That, I think, is where one would look for the authority that justifies the cross-reference consideration.

MR. CAPITELLI: I would submit the base level in the enhancement employed under specific characteristics would satisfy the fact that the Guidelines have addressed this. You have two specific characteristics.

[p. 10] THE COURT: That addresses the specific charge, but then what the Commission is saying is that there are other matters that relate to the sentencing procedure which should be considered and for which we can't anticipate all the conditions that may arise.

MR. CAPITELLI: Correct, but the one thing about the Sentencing Guidelines is that when you reach a situation wherein it is obvious or apparent that they couldn't,

couldn't possibly have envisioned, that's where the Court has the discretion to try to clear it up.

We have raised the ante in all what is referred to as white collar crimes. The Court well knows that for all white collar-type offenses, probation offenses, probation where you look at halfway houses, which this case would have been looked at several years ago, as a much, much less serious offense in terms of possible punishment; but as far as parole eligibility, it would have had the practical effect of being a less severe offense potentially than what is faced today because the numbers are more realistic. They mean more. What they say, you serve more exactly the time that is faced. You up the ante on that score.

But now you have a situation where you have an offense which is clearly a Guidelines offense. It is being tried to be cross-referenced under accessory after the fact and all the weight is dealt with under that cross-reference [p. 11] by considering an offense which is clearly not a Guidelines offense as the fiction that it would be a Guidelines offense.

The irony of the situation is the facts presented in this case – the Court is aware that the government did everything it could to minimize the seriousness of this offense in front of the eyes of Judge Collins, there is no question about that, saying that Gary Young was not involved in any crimes for the five years prior, is making a judge sentence a man that has been totally clean for five years and you are reaching back and getting a sentence and then you still are faced with the situation that he got 42 months under that sentence which, when you extrapolate under the old system, Your Honor, he could, and the

probation experts have told me, he could probably have served the same time as the eight-year recommendation because the way it actually worked, he would have had to serve between 24 and 36 months under the Guidelines, and under eight years you do a third, which would have been 32 months; 32 months or the eight years. He would potentially have served almost the exact same time.

But the irony of trying to equate Gary Young as a 32 level when all he ever faced was 32 months under the case presented, that's what Judge Collins dealt with. That's what he is being accused of, being an accessory after the [p. 12] fact.

Everything else we are doing is creating a fiction and trying to put in a pigeon hole, or a hole that elevates the seriousness of this offense. No one is here to tell you this is not a serious offense, but the numbers that are there under the basic levels as enhanced by the specific characteristics, eight more levels, and it mentions prosecutors and judges in the application notes under that section that talks about the specific characteristics, under 2C1.1. It specifically says prosecutors and judges, and I submit to you that the offense that was created here by the government's sting operation basically couldn't happen again because what you have, this situation is so unique we can't find an example, and there won't be one because you would have to go back, you would have to – Judge, if you have a Guidelines offense now and someone comes in, Gary Young comes in and he has a Guidelines offense and he comes before a judge and there is a suggestion of a bribe, he cannot go below the Guidelines without a 5K. If the Al Winters of that case says you are not getting a

letter, you can't go below that or the government gets to appeal that departure.

So they have a situation that's unique, didn't exist before, and practically can't exist later on unless you consider the small range within the actual Guidelines [p. 13] range would be enough to.

THE COURT: But what we are talking about is whether or not the cross-reference is applicable here.

MR. CAPITELLI: Correct.

THE COURT: And if you look at numbers and letters on these things, 2C1.1(c) says, this is under cross-references, "If the bribe was for the purpose of concealing or facilitating another criminal offense . . . " That is the Young offense, right?

MR. CAPITELLI: Right.

THE COURT: " . . . or for obstructing justice in respect to another criminal offense, apply 2X3.1 in respect to such other criminal offense if the resulting offense level is greater than than determined above."

It is obfuscated in the language, but doesn't it say in its own way that you do use the cross-reference in a case such as this for purpose of concealing another criminal offense?

MR. CAPITELLI: Absolutely, but what I am saying is when the Commission prepared that they could not possibly contemplate the unique situation that this Court faces and really probably couldn't have.

You are sitting in a situation where they're saying, okay, go to accessory after the fact and look at Gary

Young and his twenty-five hundred to thirty-five [p. 14] hundred pounds of marijuana and he's facing level 32. Accessory after the fact, you are going to be at least six levels lower than that, and not more than 30, not more than a 30.

I don't know. If you have a hundred tons of heroin, it can't be less than a six-level gap if Gary Young is dealing with a hundred tons of heroin and the judge is sitting here in the same case, if it was a Guidelines case, he couldn't get more than a level 30 and that gap is much larger than a six-level gap. Because of the recognition of the accessory after the fact, they were only going to carry it so far.

Here the Gary Young that was in the minds of the Commission is not facing, never is facing, never was facing, never will be facing the level 32 that is being used to potentially penalize Collins and Ross.

THE COURT: But we are referring to the sentence being imposed on Defendant Collins, not Young.

MR. CAPITELLI: That is correct.

THE COURT: And the cross-reference is referring to that particular situation.

MR. CAPITELLI: Correct, except for the term "underlying offense." You are creating a fiction when you call the underlying offense a Guidelines offense because it never was. And that is the crux of the argument and what [p. 15] the Court is going to have to disregard, I believe, and withdraw from and adopt that fiction that that is what exists when it doesn't.

And I submit that that is a denial of his constitutional rights, specifically equal protection, because we are back – we will be the only case where someone treated as an accessory after the fact will, in fact, be treated more severely than the underlying offense as it stands, forgetting about 5K and capacity as it stands, more than the six-level differential, minimum six level that is required as a practical matter, and that's what you are talking about.

That's what the Guidelines dealt with, too; let's let the sentences mean what they say, do away with parole, and do away with fictions. We are creating a fiction in this case that has never existed in another case and I predict the fact situation will not come up again.

THE COURT: I hope not.

MR. CAPITELLI: What's that?

THE COURT: I hope not.

MR. CAPITELLI: I hope not.

So, Your Honor, that is the crux of it and at the heart of it.

Moving from there to objection four, obviously if the Court does not apply the cross-reference, then 3B1.3 [p. 16] would not apply and you would be at the level 18.

THE COURT: There is no cross-reference, I would agree.

MR. CAPITELLI: You will – you wouldn't apply that.

THE COURT: I think that covers five, too.

MR. CAPITELLI: Right. That covers five, also.

Then I just wanted to document some additional significant health issues concerning Judge Collins. He's been treated for high blood pressure for ten years, the medication has been increased in strength over this time. And looking at his age and everything I think those are factors that the Court should look at and should be in the presentence report.

THE COURT: I don't think they affect the calculation, but they affect the –

MR. CAPITELLI: They're appropriate to be in.

Objection seven, I don't think any reference to matters fourteen years old that are unsubstantiated and proven to be unsubstantiated should be in the presentence report.

THE COURT: I think they have no effect on the calculations. They are allegations made; unsubstantiated, as I remember, but allegations nonetheless.

MR. CAPITELLI: In connection with our final [p. 17] objection, we ask that the Court look at some of the health factors and age as not specifically stated that way but I think under the situation that we have here, I think, I submit it on what I have written in the report, Your Honor.

THE COURT: Okay. I will review those.

Anybody want to speak for Defendant Ross?

MR. GARCIA: Yes.

THE COURT: Okay, Mr. Garcia.

MR. GARCIA: Your Honor, relative to Defendant Ross, our objection number one was –

THE COURT: The cross-reference, too?

MR. GARCIA: Correct. And I think Mr. Capitelli handled that very well, but I would like to add one thing, Your Honor. I think the obvious intent of the cross-reference section of the accessory after the fact is obviously to make the offender as culpable as the underlying offender. Simply saying if you are going to get together with someone and attempt to, let's say, bribe an official in a particular case, you are not going to be exposed to any less than the underlying offender is exposed to. It doesn't say you have to go up to a category 26 or category 32. Had the underlying offense been something less serious, obviously we wouldn't be facing these large numbers.

Your Honor, the underlying offense condition only carries what the underlying offender faces and I believe it [p. 18] would be a miscarriage of justice to have Gary Young facing 24 to 30 months under the underlying offense, but have Mr. Ross or Judge Collins face 121 or 161 months. I don't think that was the intent that went along with the statute. I think they are trying to say if you hold hands with someone, you will be as culpable as they are. You will face what they face, you're not going to allow them to get more time than you get.

Along that rationale, I think it is only fair that the cross-reference in this case be disregarded since the underlying offense is pre-Guidelines and Mr. Young said under oath during the trial that he expected that his range was 24 to 36 months.

On objection number two, Your Honor, there was a suggestion that perhaps there would be a two point, two-level increase due to an adjustment of obstruction of justice and left it up to the discretion of the Court, but stated that it was possible that Mr. Ross provided materially false information during his testimony during trial. I submit to the Court that there has been no evidence of any such materially false statement given by Mr. Ross during his testimony in trial, and I did direct the Court's attention to the United States Sentencing Guidelines application note one on page 3.9 which says the statements should be evaluated in the light most favorable to the [p. 19] defendant.

This motion is not intended to push for the exercise of a constitutional right. Your Honor, Mr. Ross did testify there was no material fact that has been disproven. The government put on no rebuttal testimony to attempt to disprove any of the material facts that Mr. Ross alleged. And, Your Honor, as has always been the case, if there were perjury that took place during Mr. Ross' testimony, if the government can prove that perjury, they have a vehicle at their disposal, which is obviously an indictment, where they can handle that. And I am certain if that were the case, that they would certainly have already done it.

In view of the aggressive manner in which they handled this case, that has not been done, and I suggest there should not be a two-level increase in this situation.

Your Honor, the balance of the presentence report we certainly could have picked out facts that we did not

agree with because the version really was the government's version of what transpired, but I didn't think it was necessary to retry the case. Your Honor knows what sections I believe that we have basically disagreed with and I didn't want to do another thirty or forty objections on factual issues.

THE COURT: Thank you, Mr. Garcia. Mr. Cole?

MR COLE: Thank you, Your Honor.

[p. 20] THE COURT: Are you aware of any cases that would justify applying the cross-reference portion of the Guidelines?

MR. COLE: Yes, sir, *United States versus Cusack*, 901 F.2d 29, a Fourth Circuit –

THE COURT: What was the reference?

MR COLE: 901 F.2d 29, Fourth Circuit, 1990. I will refer the Court to page 32 wherein discussing an ex post facto aspect that had been alleged concerning the application of the Guidelines to pre-Guidelines conduct, the Court said, "The particular guidelines that takes account of all," quote, " 'relevant conduct,' " close quote, "in setting the offense level," and it makes reference to Section 1B1.3, "does not violate the clause merely because it may have the effect of stiffening a penalty for a current charged offense by reference to uncharged pre-Guidelines conduct." I think that's just the issue that Mr. Capitelli was trying to make. This occurred prior to the Guidelines.

This also goes well with the language of 1B1.3 which talks about what is relevant conduct and it says that it includes things that are in the cross-references in Chapter

Two. And number four under A says any other information specified in the applicable guidelines within the cross-references. That's on page 1.16 of the Guidelines.

[p. 21] The *Cusack* case is a comment on that section and states quite clearly that relevant conduct includes conduct which may have occurred prior to the Guidelines and which isn't even charged in the offense.

Your Honor, I think as well that the Court needs to look at some of the notes in the background section applicable to 2C1.1, which is the bribery guidelines. In the second paragraph of those background notes, the Sentencing Commission – this is on page 236 – the Sentencing Commission describes the crime of bribery and talks about how diverse it can be and how the object of the bribe may range from something as simple as a government contract or some information that will help a contractor have an edge up in the competition, all the way up to obstruction of justice. And it talks about how the bribery guidelines must be designed to take into account this wide range of activity and the wide range of harm that can be caused in the course of bribery.

That's exactly what they have done here quite clearly on the face of the Guidelines. Sure, they take into account if it is a high level public official who is being bribed. That under B2A will cause, or B2B will cause an eight-level increase. But they go on in the cross-reference and they say, look, if the bribe was for the purpose of obstructing justice, then the person who took that bribe [p. 22] being a public official which is innate in the Guidelines itself, is going to be judged by how seriously

that underlying offense was, how serious his crime was, what did he obstruct justice in.

If he obstructed justice in a crime of a minor nature, then his crime would be adjudged accessory after the fact and may not even invoke or kick in because it wouldn't be as high as the level 18. But if it is a serious crime under the Guidelines under which the Commission has considered to be so serious that it warrants a higher penalty, then they are saying that is how you judge the seriousness of this crime, is by looking at the penalty that we ascribe to the underlying conduct, underlying crime, and punish this person as an accessory after the fact to that underlying activity.

It is clear not only from the *Cusack* case, but from the notes in 2C2.1 that's what the Sentencing Commission is after. If a judge is going to take a bribe, he is responsible for how serious the crime is that underlies it. There are bribes that judges and prosecutors could conceivably take which would not obstruct justice, in which case they are not going to be subject to the cross-reference.

In this case, however, it is clear that justice was obstructed. The count was charged, and it was found by the [p. 23] jury to be true beyond a reasonable doubt, as well the facts clearly establish it.

The Guidelines is clear on its face, Your Honor. I don't think there is any question of the applicability of it. It is a question of relevant conduct and the case law is clear that that can include conduct prior to the Guidelines.

A few comments on some of the other arguments that were made. The plea bargain was a genuine plea bargain and the crime that Gary Young committed was a genuine crime and the amount charged was an accurate reflection of his criminal activity. So there is no injustice being worked by pegging into what Gary Young was charged with. It is what he did and it was a genuine case that genuinely reflected his conduct.

They talk about how Gary Young was only subjected to 24 to 36 months. I'm not sure where that came from, but, Your Honor, Gary Young was subjected to 20 years in jail for a penalty and parole doesn't have to be given and his criminal history was high, and I submit that the Guidelines calculation that you saw for Gary Young even in his presentence report was not accurate and that his sentence would have been considerably higher had an accurate calculation been done.

The disparity between the sentence that Gary Young [p. 24] could get I first of all would submit is not borne out by the facts; but secondly, the issue is not was there disparity. The issue is what kind of bribery was committed here and what effect did it have on the system. And that is the way the Sentencing Guidelines say we must judge the severity of that bribe and they have provided for it rather clearly.

On the issue of the obstruction of justice, two points. Mr. Garcia says that there were no material facts that were shown to be false in Mr. Ross' testimony. Your Honor, I would submit that there are very few, if any, material facts shown to be true in Mr. Ross' testimony. He made up this fantastic story about mahogany ink and

how this $100,000 was supposed to come to him and about the reasons that he was having his discussions with Gary Young and the reasons why his voice on the tape were saying all these words that so clearly meant bribery when he was never involved in any bribery. That was pure fantasy. Those were lies, Your Honor. The jury saw through them instantly and I would submit that Your Honor can easily see through them instantly.

He need not be charged with bribery for this to apply, and the cases are quite here. He does have the right to take the stand, but the cases are numerous and quite clear that he does not have the constitutional right to take [p. 25] the stand and lie. I would direct the Court's attention to the case *United States versus Barbosa*, 906 F.2d 1366, the case of the *United States versus Keys*, 899 F.2d 983, both of which clearly talk about if a defendant lies at trial and the Court talk about if a defendant lies at trial and the Court is able to make a determination that that defendant did lie at trial, this obstruction, then a two-point enhancement is appropriate. The defendant surely has a constitutional right to testify at trial but not to lie. And if he lies, that's not covered by his constitutional right.

Mr. Garcia also made reference to the issue of you have to view it all in the light most favorable to the defendant. Well, that has been spoken to by the Fifth Circuit, Your Honor. And in the case of *United States versus Garcia* at 902 F.2d 324, the Fifth Circuit stated that that application and that rule of using the light most favorable to the defendant only applies when the judge can't really have a firm conviction one way or the other

on the facts. It doesn't mean that you bend over backward to give him every benefit of the doubt. It only means if you, as the judge who makes the determination, cannot decide the issue, then it falls in his favor. But if the facts are such that it is easily decided by you, and I submit they were certainly in this case from Mr. Ross' testimony, then that has no application here.

[p. 26] If the Court has no further questions, that's all the government has considering the issue of the calculation of the Guidelines.

THE COURT: Thank you, Mr. Cole. Anything else, Mr. Capitelli?

MR. CAPITELLI: I would like to address one point, Your Honor. Your Honor, of all the incredible statements that Mr. Cole has managed to make during the course of this litigation, he made one just now that is unfathomable. He points to the presentence investigation of Gary Young which was the heart of the case that the government presented which shows a 24- to 36-month guideline for Judge Collins to consider in sentencing, and now says the government knows that was wrong and it should have been higher so you should penalize the Judge even more. I think that epitomizes the fiction the government is trying to get in order to trumpet Mr. Cole's scalp the way he wants to.

MR. GARCIA: If you don't mind rebuttal to Mr. Cole's comments, apparently he thinks everyone in this courtroom is deaf and dumb. He wants to know where we get 24 to 36 months. It was testified to not only by his witness, but by his attorney, and at no time did Mr. Cole

question either one of them relative to the accuracy of that.

Another thing I find unbelievable is that Mr. Cole [p. 27] would suggest to the Court that there were no material facts proven to be untrue, that very few material facts were proven to be true. Again, we have no presumption of innocence, there is a presumption of guilt that Mr. Cole would like us to overcome. That's absolutely amazing. The only one truly shown to have lied was Gary Young who admitted lying and admitted perjury on three different occasions, and Mr. Cole hasn't aggressively pursued that. That's been done, including the recent charge he has just been charged with, Your Honor.

That's all I have to say.

THE COURT: Thank you, Mr. Garcia.

MR. COLE: If I may briefly respond. As to the calculation on the guidelines for the parole guidelines, first of all, those are only calculations. Those are only recommendations. To clear up the record, we were only informed of them after the trial that the probation officer here recalculated it. We looked at it and this is the source of our information.

Mr. Capitelli was trying to make the argument of what actually applies to Gary Young. I was only trying to correct him in saying what actually applied was different than what was in the sentencing report.

As to Mr. Garcia's comments about the presumption of innocence and burden of proof, of course the government [p. 28] recognizes we have it and we have it here.

But it is clear that Mr. Ross fabricated his testimony in this case.

Thank you.

MR. CAPITELLI: Your Honor, that is just not true. He spoke to Mr. Bonnaffons before Mr. Bonnaffons testified. Mr. Bonnaffons is not here today. But Mr. Bonnaffons told me the same thing he told Mr. Cole, that he thought there might have been a miscalculation. Neither the government nor the defense pursued that. Mr. Cole is just flat out lying.

THE COURT: Gentlemen, I think there are other ways of characterizing what counsel make in their statements, but I suppose that's part of it as well.

Anything else anybody else wants to say?

I did not ask, but I think I should put on the record counsel for both Defendant Collins and Ross, you have received the presentence report and read it and discussed it with your client?

MR. CAPITELLI: Yes.

MR. GARCIA: Yes.

THE COURT: I'm going to review these matters that have been addressed now by counsel. We will take about a ten-minute recess and come back and I will give you my comments on the objections that have been filed, and then I will indicate if the Guidelines will be affected, and we [p. 29] will proceed to sentence.

(Recess.)

THE COURT: Be seated, please. Counsel, let me just briefly go over the objections. I have already indicated, I think, generally the comments about them. As to Defendant Collins, the first objection which we referred to was relating to the hearsay statement. I indicated these would not be considered and that objection was noted, will be granted.

The second objection related to the plea agreement; that is an error in the presentence report. I reviewed my trial notes and clearly there was a pretrial plea agreement between the government and Gary Young. The statement of the Assistant United States Attorney Winters indicated that there apparently either was no cooperation or not sufficient cooperation to justify a letter on his behalf and that error has been noted.

I will note the objection number three which also is the same basic objection as objection number one referred to in Defendant Ross' objection to the presentence report referring to the cross-reference. I have referred earlier to the language of section 2C1.1(c) which refers to cross-references and indicates as follows, and I quote, "If the bribe was for the purpose of concealing or facilitating another criminal offense, or for obstructing justice in [p. 30] respect to another criminal offense, apply 2X3.1, accessory after the fact, in respect to such other criminal offense if the resulting offense level is greater than that determined above." It seems clear to me from the language there and from interpreting that language and the following similar language, although there has been no case in point that I have found exactly on point with the facts of this case, but there is clearly nothing to indicate

that the cross-reference portion of the Sentencing Guidelines is limited to any post-1987 act. The Guidelines have been applied, as I indicated in my comments to counsel, to certain state charges. And the *Cusack* case out of the Fourth Circuit was called to my attention which I think clearly indicates that the cross-reference is appropriate under the facts of this case. It is certainly clearly the intent of the Guidelines to look at the total offense, at the total harm done by the charges that have been filed and if there could be no cross-reference utilized, then clearly one could not consider, in this case at least, the effect of the bribe. So I am satisfied that the Guidelines are intended to apply to cases such as this and will adopt the cross-reference procedure in the sentences to be imposed.

The fourth objection of Defendant Collins relates to the offense level being increased two levels and clearly if there is no cross-reference, then I agree there would be [p. 31] no two-point increase.

Objection number five is a similar objection, relates to the same point and I think need not be considered.

Objection number six relates to the health condition of the defendant. As I have indicated, this was a matter certainly of concern to the Court and it will have to be involved in any sentence imposed, but it has no actual effect upon the calculation and, therefore, there need be no change made in the report as to that issue.

Objection number seven refers to unproven allegations that are said to be over fourteen years of old. These are merely allegations. They're not substantiated fact and, again, have no effect upon determining the calculation and therefore need not be revived.

The eighth and final objection on behalf of Defendant Collins relates to the two-point consideration for abuse of public trust which relates to the alleged violation of public trust and that is referred to in the Guidelines as a proper matter for consideration.

Defendant Ross has filed two objections, one relates to the cross-reference which I have already referred to and the same ruling would apply.

The second objection is to any adjustment for obstruction of justice. The Court heard the evidence in the [p. 32] case and is satisfied that from the evidence which the Court heard an application of the adjustment for obstruction of justice is appropriate in accordance with this case.

Those, then, are the comments that I would make on the objections and at this time I would suggest we proceed with the sentencing in the case.

Do you want to call any witnesses, Mr. Capitelli? Mr. Murray?

MR. CAPITELLI: No, Your Honor.

MR. MURRAY: No, Your Honor.

THE COURT: All right. Defendant Collins, is there anything you wish to say at this time, sir?

DEFENDANT COLLINS: No, I do not wish to say anything.

THE COURT: I have received a number of letters from people who have written on behalf of both defendants in the case. Some of them were addressed to

me, some were sent to the probation officer. All of them, however, have come to my attention.

This is a sad day for the judiciary. There is much I could say, I suppose, but I think it would not be fitting. The charge of which Defendant Collins stands convicted is a charge of bribery. It is betrayal of trust and I suppose no crime is more corrosive of the system of justice than bribery. If the public should ever lose faith in the [p. 33] honesty and integrity of judges, I fear we would be reduced to vigilanteism [sic] and chaos. I'm not unmindful of the past activities of Defendant Collins in civil rights matters. A number of letters have been written to me relating to work that he had done on behalf of civil rights matters some twenty years or more ago and these are most impressive. As I say, it is a sad day not only for the judiciary, but for the defendants in this case and for their families. Nonetheless, the proceeding must proceed.

Defendant Collins, if you will stand for sentencing, please.

(Defendant and counsel standing.)

THE COURT: Again, is there anything that you wish to say to me at this time?

DEFENDANT COLLINS: No, Your Honor.

THE COURT: No?

DEFENDANT COLLINS: No.

THE COURT: The defendant stands guilty by the verdict of the jury of the charges in Counts One, Two, and Three, and convicted of the charged violation of Title 18 U.S. Code Section 371, Section 201(b)(2), Section 1503,

and Title 18 U.S. Code Section 2; charges of bribery, conspiracy, obstruction of justice as charged. The sentence is imposed pursuant to the provisions of the Sentencing Reform Act of 1984. The Court adjudges that the defendant [p. 34] is guilty as charged and convicted, and orders the defendant is hereby committed to the custody of the United States Bureau of Prisons under Count One to be imprisoned for a period of 60 months. Under Count Two, the defendant is hereby committed to the custody of the United States Bureau of Prisons for a term of 82 months. Under County Three, the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 60 months. The sentence imposed under Counts One and Three are to run concurrently with the sentence imposed under Count Two.

Upon release from imprisonment, the defendant will be placed on supervised release for a term of two years. The conditions of the supervised release, the defendant will not commit another federal, state, or local crime during the period of supervision, is prohibited from possessing a firearm, shall not illegally possess a controlled substance, and will abide by the standard conditions of probation recommended by the United States Sentencing Commission and adopted by this Court. Upon release from the confinement portion of the sentence, the defendant is ordered to report to the United States Probation Office of this district within 72 hours.

I'm not going to impose a fine. I think a fine would be an added burden upon the family of Defendant [p. 35] Collins. They have suffered and will continue to suffer. There, therefore, will be no fine set.

There is mandatory assessment of $50.00, for a total of $150.00.

Defendant Collins, I remind you you have the right to appeal the sentence of this Court within ten days.

DEFENDANT COLLINS: Thank you.

MR. MURRAY: We would give oral notice, as we are allowed to under the Rules, that we do intend to appeal the conviction and sentence and we will file the appropriate written notice, also.

THE COURT: I will sign an order directing that the defendant will voluntarily surrender to the Bureau of Prisons' institution to be designated by that institution within sixty days of this date. The release provisions that were heretofore imposed will continue in effect, and that is on personal recognizance.

I would also direct Defendant Collins that pending your reporting to the institution to be designated, you will not return to this courthouse unless you have approval of this Court to do so.

Anything further?

MR. MURRAY: Your Honor, only the matter of bond pending appeal. Does the Court want to take that up now or should we file a motion?

[p. 36] THE COURT: I have nothing to consider, so you file it and I will consider it.

MR. MURRAY: Fine, Your Honor.

THE COURT: I would also ask that the defendant report to Chief Catalano in Room 600 for processing when leaving the courtroom this morning.

MR. MURRAY: Very well. Thank you, Your Honor.

THE COURT: Thank you, Counsel.

Defendant Ross, anything you wish to say, sir?

(Defendant Ross and counsel standing.)

THE DEFENDANT: No, sir.

THE COURT: Again, I have reviewed the many letters that I have received on your behalf indicating the benefit that you have provided to those with whom you have been associated, and I'm not unmindful of all of those and the benefits you have given.

You do stand convicted of three charges filed against you in this indictment and sentencing will therefore be imposed at this time. As to Defendant Ross, the defendant has been convicted of the offenses of violation of Title 18 U.S. Code Section 371, Title 18 U.S. Code Section 201(b)(2), Title 18 U.S. Code Section 1503, and Title 18 U.S. Code Section 2. The sentence is imposed pursuant to the Sentencing Reform Act of 1984. The Court adjudges the defendant guilty as charged and convicted and orders that [p. 37] the defendant is hereby committed to the custody of the United States Bureau of Prisons under Count One to be imprisoned for a period of 60 months. Under Count Two the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a period of 88 months. Under Count Three the defendant is hereby committed to the custody of the

United States Bureau of Prisons to be imprisoned for a term of 60 months. The sentence imposed under Counts One and Three are to run concurrently with the sentence imposed under Count Two.

When released from custody of the Bureau of Prisons, the defendant will report to the probation office for a period of supervised release for a period of two years. Under the supervised release the defendant shall not commit another federal, state, or local crime during the period of supervision. The defendant is prohibited from possessing a firearm or other dangerous weapon or illegally possess a controlled substance, and must abide by the standard provisions of supervision recommended by the United States Sentencing Guidelines and adopted by this Court and will report in person to the probation office of this district within 72 hours of his release from the custody of the Bureau of Prisons.

As to the fine, I'm not go [sic] to impose a fine. I am satisfied in this case that a fine would be a greater burden [p. 38] upon the family of the defendant than upon the defendant himself and, therefore, it would serve no purpose.

There will be a special mandatory assessment of $50.00 under Counts One, Two, and Three, for a total of $150.00.

Again, Mr. Ross, I remind you you have ten days to appeal the sentence of this Court. I am signing a voluntary surrender order which will direct you to report within 60 days to the institution to be designated in writing to you and you will be notified by the probation officer of this Court.

Again, I would request Defendant Ross report to Chief Catalano in Room 600 for processing at the conclusion of this proceeding.

MR. UDDO: We would like at this time to serve notice upon the Court of Mr. Ross' intent to appeal, which will be formalized in writing.

THE COURT: Of course. Anything further?

MR. GARCIA: No, Your Honor.

THE COURT: All right. Counsel, I have here orders to surrender, read as follows: it is hereby ordered that Robert F. Collins and John Ross, defendants, having been sentenced in the above case to the custody of the Attorney General, are hereby ordered to surrender themselves to the Attorney General reporting to the designated institution on [p. 39] or before 12:00 noon on October 7, 1991.

It is further ordered that the probation officer of this Court advise the defendant of the name and location of the institution in which he is to serve his sentence within a reasonable period of time prior to the time and date that he is to report to the institution.

Dated today, September 6, and I have signed it and would ask that this be signed.

MR. GARCIA: You gave us sixty days, I think that should say November.

THE COURT: I'm sorry, November 6. I changed it to November 6.

The order will be made a part of the record in the case and counsel will be provided with a copy.

The clerk will file the presentence investigative report. It will be available for those who need it at a later date.

Anything further?

MR. MURRAY: No.

THE COURT: Recess.

(Which concluded the proceedings.)

[p. 40] REPORTER'S CERTIFICATE

I, Sally Kohn, CSR, Official Court Reporter for the United States District Court, Eastern District of Louisiana, Section "I", certify that the above and foregoing contains a true and correct transcription of the proceedings held in the above-entitled and -numbered cause, at the time and place hereinabove recited.

/s/ Sally Kohn
SALLY KOHN, CSR
Official Court Reporter
Section "I"

APPENDIX F

ATTACHMENT ONE

ID

DATA ASSOCIATES
LOUISIANA POLL

Phone Number _____ Date/Time _____

Interviewer ____ Coder/Entry _____

DATE

TIME

GENERAL INSTRUCTIONS: STATEMENTS TO BE READ TO RESPONDENT ARE IN UPPER AND LOWER CASE. INSTRUCTIONS TO INTERVIEWERS ARE IN ALL CAPS.

Hello, I'm ___ from Data Associates Incorporated, the national opinion polling firm. We're doing research on public opinion regarding the Louisiana Courts and the criminal justice system. Would you take a few minutes to answer some questions?

INTVWER

CODER

[IF RESPONDENT ASKS "WHAT ABOUT?" SAY "Attitudes toward the courts and the criminal justice system especially in Eastern Louisiana. IF R ASKS "HOW LONG WILL IT TAKE?" SAY "About 10 to 15 minutes."]

ENTRY

For the poll results to be accurate, we need to speak to a registered voter in your household. Are you registered to vote in Louisiana? [IF R IS NOT A REGISTERED VOTER, ASK TO SPEAK TO SOMEONE IN THE HOUSEHOLD WHO IS REGISTERED TO VOTE. IF NO REGISTERED VOTERS IN HOUSEHOLD, TERMINATE INTERVIEW.]

[PAUSE FOR ANSWER. IF THE PERSON YOU ARE TALKING TO IS THE RIGHT ONE. THEN SKIP TO QUESTION A1 AND PROCEED WITH THE SURVEY. IF NOT, ASK TO SPEAK TO THE PERSON NAMED. IF THE PERSON COMES TO THE PHONE, INTRODUCE YOURSELF AS ABOVE AND THEN GO TO QUESTION A1 AND PROCEED WITH THE SURVEY.]

[IF THE RIGHT PERSON IS NOT HOME, ASK THE FOLLOWING:] When would be a good time for us to call back to reach him/her? Who should we ask for? [RECORD] ___: IF PERSON OBJECTS TO PROVIDING A FULL NAME, SAY THAT ONLY THE FIRST NAME IS NECESSARY.]

[WHEN THE CORRECT PERSON IS ON THE PHONE, SAY:] The phone number of your household was selected randomly by a computer. We do not know your name. Your answers are confidential. The first few questions are about your possible experience with jury trials.

A1. First of all, are you serving on a jury now or have you been called for jury duty in the near future?

YES ..... 1-[TERMINATE INTERVIEW]
NO ..... 2}
NOT SURE ..... -8} [ASK A2]
NO ANSWER ..... -9}

A1

A2. Have you ever served on a jury in the past or have you ever been called for jury duty?

YES ..... 1-[ASK A3]
NO ..... 2] A2
NOT SURE ..... -8} [SKIP TO B1]
NO ANSWER ..... -9]

A3. [IF CALLED FOR JURY DUTY] Did you serve on a civil jury or was it a

CIVIL TRIAL(S) 1
CRIMINAL
TRIAL(S) 2
BOTH CRIMINAL
AND CIVIL 3 A3
NEITHER, CALLED
BUT DID NOT
SERVE 4
NOT SURE ..... -8
NO ANSWER/NOT
ASKED ..... -9

B. Now I'm going to read you a series of statements about the legal system. For each one I read to you, please tell me if you *agree strongly, agree somewhat, disagree somewhat, disagree strongly* or have *no opinion.*

		AGREE STRO-NGLY	AGREE SOME-WHAT
B1.	People accused of a crime ought to have to prove they are innocent.	1	2
B2.	In some cases, it is necessary for the government to use informers who work undercover.	1	2
B3.	When an FBI agent testifies in a trial, his testimony should be given more weight than the testimony of other witnesses.	1	2
B4.	The government's use of wire tapes and hidden microphones is a threat to the freedom of honest people.	1	2
B5.	When a judge is charged with a crime, it is very likely that he is guilty.	1	2
B6.	Most FBI "stings" are little more than attempts to entrap honest people into crimes they would not otherwise commit.	1	2
B7.	When the government brings a person to trial, he or she is probably guilty of the crime charged.	1	2
B8.	Prosecutors from out of town, usually don't understand how things are done in the local community.	1	2

E - T	DIS- AGREE SOME- WHAT	DIS- AGREE STRO- NGLY	NOT SURE	NO ANS- WER	
	3	4	-8	-9	PROVEINO
	3	4	-8	-9	UNDERCOV
	3	4	-8	-9	FBITRUTH
	3	4	-8	-9	WIRETAPS
	3	4	-8	-9	CHGJUDGE
	3	4	-8	-9	STINGBAD
	3	4	-8	-9	CHARGED
	3	4	-8	-9	PROSOUT

C1. Now I'd like to ask you a few questions about one particular case that will be coming to trial soon in New Orleans. Have you heard about the case in which a federal judge, Robert Collins, has been indicted for conspiring with John Ross to take a bribe?

YES ..... 1-[ASK C2]
NO ..... 2]
NOT SURE ..... -8} [SKIP TO C3] HEARDOF
NO ANSWER ..... -9]

C2. [IF YES] What comes to mind when you think about this case?

[RECORD:] _____ MIND1

_____

_____ MIND2

C3. [ASK EVERYONE] Judge Collins and John Ross are charged as part of an FBI sting operation in which a man charged with drug trafficking, Gary Young, gave $100,000 to Ross to get his friend Judge Collins to go easy in sentencing Young. The judge and Ross did not know that Young was working for the government. It is alleged that some of the money was used to bribe the judge and that both Judge Collins and Ross had money from Young in their possession when their offices were searched. Based upon what I have just told you or

anything else you may have heard, seen or read about this case, do you think that Judge Robert Collins is definitely guilty, probably guilty, probably not guilty, definitely not guilty or do you have no opinion in this case.

DEFINITELY GUILTY 1
PROBABLY GUILTY 2
PROBABLY NOT GUILTY 3
DEFINITELY NOT GUILTY 4 GUILTY1
NOT SURE ..... -8
NO ANSWER ..... -9

C4. What about John Ross? Do you think he is definitely guilty, probably guilty, probably not guilty or definitely not guilty?

DEFINITELY GUILTY 1
PROBABLY GUILTY 2
PROBBALY NOT GUILTY 3
DEFINITELY NOT GUILTY ..... 4 ROSSGLTY
NOT SURE ..... -8
NO ANSWER ..... -9

C5. Much of the case against Judge Collins is based upon wiretaps on his and the other defendant's phones and taped recordings between Young and Ross without Ross's knowledge

that they were being taped. Does this information make you more likely to think Judge Collins is guilty, less likely to think he is guilty or does it not affect you opinion?

MORE LIKELY TO
THINK GUILTY 1
LESS LIKELY 2
NO EFFECT ..... 3 TAPGUILT
NOT SURE ..... -8
NO ANSWER ..... -9

C6. Gary Young really was charged with drug trafficking and had served 40 months in prison on an earlier drug trafficking charge. He agreed to work for the FBI as an informant on New Orleans area drug dealing in order to get a lighter sentence on this second offense. Does this make you more likely to think Judge Collins is guilty, less likely to think he is guilty or does it not affect your opinion?

MORE LIKELY TO
THINK GUILTY 1
LESS LIKELY 2
NO EFFECT ..... 3 DEFGUILT
NOT SURE ..... -8
NO ANSWER ..... -9

C7. Supporters of Judge Collins say he is innocent. They say this is another example of the FBI and the Justice Department trying to set-up black judges and other government officials. They point out that while Collins and Ross are black, Young is white and a convicted felon facing a

severe prison sentence. Hence, the FBI put Young up to going after Collins. Does this make you more likely to think Judge Collins is guilty, less likely to think he is guilty or does it not affect your opinion?

LESS LIKELY 2
NO EFFECT 3
NOT SURE ..... -8
NO ANSWER ..... -9

DEFENSE

C8. Collins supporters also say that Judge Collins did not go easy on Young as he would have if he had been bribed. Collins gave Young 42 months which is hardly a light sentence. Now that you have heard the defense side, what do you think? Is Judge Collins definitely guilty, probably guilty, probably not guilty, definitely not guilty or do you have no opinion in this case.

DEFINITELY GUILTY 1
PROBABLY GUILTY 2
PROBABLY NOT GUILTY 3
DEFINITELY NOT GUILTY 4
NOT SURE ..... -8
NO ANSWER ..... -9

GUILTY2

Finally, just for statistical purposes, I need to ask you a few background questions about you and your household. All of your answers will be strictly confidential. First of all...

F1. Do you follow the news a lot, a little, or not at all?

A LOT 1
A LITTLE 2
NOT AT ALL ..... 3 NEWSFAN
NOT SURE ..... -8
NO ANSWER ..... -9

F2. What newspapers do you subscribe to or read regularly? [RECORD ALL]

_____ PAPER1

_____ PAPER2

F3. What magazines do you subscribe to or read regularly? [RECORD ALL]

_____ MAG1

_____ MAG2

F4. Are you presently employed outside the home, either full-time or part-time?

EMPLOYED 1
UNEMPLOYED .... 2 } [ASK F5]
RETIRED 3
HOMEMAKER 4
STUDENT ..... 5 } [SKIP TO F6]
NO ANSWER ..... -9 WORK

F5. [IF EMPLOYED, UNEMPLOYED OR RETIRED] What type of work do/did you do?

[RECORD] _____ JOB

F6. [ASK EVERYONE] Have you ever had a job that required you to supervise or manage other workers?

YES 1
NO 2
NOT SURE ..... -8
NO ANSWER ..... -9

SUPERVISE

F7. [ASK EVERYONE] Have you ever had a job in the field of law enforcement?

NO 2
NOT SURE ..... -8
NO ANSWER ..... -9

LAWENFOR

[IF YES] What did you do? _____ LAWJOB

F8. [ASK EVERYONE] What is the highest grade of school you have completed? [FOR STUDENTS, RECORD PRESENT LEVEL.]

GRADE OR
ELEMENTARY 1
SOME HIGH
SCHOOL 2
HIGH SCHOOL
DIPLOMA 3
TRADE,
TECHNICAL OR
VOCATIONAL 4

SCHOOL

SOME COLLEGE ... 5
COLLEGE DEGREE
[BA, BS, ETC] 6
POST COLLEGE
WORK, NO
DEGREE 7
POST COLLEGE
DEGREE 8
NOT SURE ..... -8
NO ANSWER ..... -9

F9. [IF ATTENDED COLLEGE OR MORE] What was your major? ____ MAJOR

F10. Are you married, divorced, widowed or have you never been married?

MARRIED 1
SEPARATED ..... 2 } [ASK F11]
DIVORCED 3
WIDOWED 4
SINGLE ..... 5 } [SKIP TO F15]
NOT SURE ..... -8
NO ANSWER ..... -9

MARITAL

F11. [IF MARRIED/SEPARATED] Is your husband/wife presently employed outside the home, either full-time or part-time?

EMPLOYED 1
UNEMPLOYED .... 2 } [ASK F12]
RETIRED 3
HOMEMAKER 4
STUDENT ..... 5 } [SKIP TO F15]
NO ANSWER ..... -9

SPOUWORK

F12. [IF SPOUSE EMPLOYED, UNEMPLOYED OR RETIRED] What type of work does/did your husband/wife do?

[RECORD] _____ SPOUSJOB

F13. What is the highest grade of school your husband/wife completed? [IF A STUDENT, RECORD PRESENT LEVEL]

GRADE OR ELEMENTARY 1
SOME HIGH SCHOOL 2
HIGH SCHOOL DIPLOMA 3
TRADE, TECHNICAL OR VOCATIONAL 4
SOME COLLEGE ... 5
COLLEGE DEGREE [BA, BS, ETC] 6
POST COLLEGE WORK, NO DEGREE 7
POST COLLEGE DEGREE 8
NOT SURE ..... -8
NO ANSWER ..... -9

SPOUSED

F14. [IF ATTENDED COLLEGE OR MORE] What was his/her major? SPOMAJOR

_____

F15. Have any of your close friends or relatives ever had a job in law enforcement?

YES 1
NO 2
NO ANSWER ..... -9

[IF YES, PROBE FOR RELATIONSHIP AND TYPE OF JOB] _____ TYPELAW

_____

F16. In what year were you born? ____ BIRTH

_____

F17. [ASK ONLY IF VERY UNSURE] What is your sex?

MALE ..... 1 SEX
FEMALE 2

F18. What is your race or ethnicity?

WHITE 1
BLACK 2
JEWISH...ISRAELI .. 3
CREOLE 4
CAJUN 5
ARAB, OR OTHER MIDDLE EASTERN 6
JAPANESE 7
FILIPINO 8
CHINESE ..... 9 RACE
KOREAN 10
VIETNAMESE 11
TAIWANESE 12
OTHER ASIAN.. [_____ 13
CHICANO, MEXICAN AMERICAN 14
CUBAN 15

OTHER HISPANIC
[_____] 16
OTHER RACE...
[_____] 17
REFUSED..
[GUESS:_____] .. -7
NOT SURE ..... -8
NO ANSWER ..... -9

F19. We don't need to know that exact amount, but what was your total income for 1990? [IF R WANTS TO KNOW BEFORE OR AFTER TAXES, SAY "Before taxes."]

RECORD AMOUNT _____ INCOME90

REFUSED ..... -7
NOT SURE ..... -8
NO ANSWER ..... -9

That's the last question. On behalf of the Data Associates, I want to thank you. Your answers have been very helpful and they will be kept confidential.

ATTACHMENT TWO

COLLINS, EASTERN LOUISIANA SURVEY PRELIMINARY FREQUENCIES

A2 EVER SERVED ON JURY

VALUE LABEL	VALUE	FREQUENCY	PERCENT	VALID PERCENT	CUM PERCENT
YES	1.00	218	47.7	48.0	48.0
NO	2.00	236	51.6	52.0	100.0
NO ANSWER	-9.00	2	.4	MISSING	
NOT SURE	-8.00	1	.2	MISSING	
	TOTAL	457	100.0	100.0	

VALID CASES 454 MISSING CASES 3

A3 SERVE ON CIVIL OR CRIMINAL JURY

VALUE LABEL	VALUE	FREQUENCY	PERCENT	VALID PERCENT	CUM PERCENT
CIVIL ONLY	1.00	56	12.3	26.8	26.8
CRIMINAL ONLY	2.00	61	13.3	29.2	56.0
BOTH	3.00	11	2.4	5.3	61.2
NEITHER, DIDN'T SERV	4.00	81	17.7	38.8	100.0
NO ANSWER	-9.00	238	52.1	MISSING	
NOT SURE	-8.00	10	2.2	MISSING	
	TOTAL	457	100.0	100.0	

VALID CASES 209 MISSING CASES 248

PROVEINO PROVE INNOCENCE

VALUE LABEL	VALUE	FREQUENCY	PERCENT	VALID PERCENT	CUM PERCENT
AGREE STRONGLY	1.00	167	36.5	37.6	37.6
AGREE SOMEWHAT	2.00	114	24.9	25.7	63.3
DISAGREE SOMEWHAT	3.00	54	11.8	12.2	75.5
DISAGREE STRONGLY	4.00	109	23.9	24.5	100.0
NO ANSWER	-9.00	6	1.3	MISSING	
NOT SURE	-8.00	7	1.5	MISSING	
	TOTAL	457	100.0	100.0	

VALID CASES 444 MISSING CASES 13

UNDERCOV NECESSARY USE UNDERCOVER

VALUE LABEL	VALUE	FREQUENCY	PERCENT	VALID PERCENT	CUM PERCENT
AGREE STRONGLY	1.00	189	41.4	43.3	43.3
AGREE SOMEWHAT	2.00	197	43.1	45.2	88.5
DISAGREE SOMEWHAT	3.00	29	6.3	6.7	95.2
ILLEGIBLE	4.00	21	4.6	4.8	100.0
ILLEGIBLE	Illegible	Illegible	Illegible	Illegible	
NOT SURE	-8.00	16	5.5	Illegible	
	TOTAL	457	100.0	100.0	

VALID CASES 436 MISSING CASES 21

FBITRUTH FBI TESTIMONY MORE WEIGHT

VALUE LABEL	VALUE	FREQUENCY	PERCENT	VALID PERCENT	CUM PERCENT
AGREE STRONGLY	1.00	37	8.1	8.8	8.8
AGREE SOMEWHAT	2.00	95	20.8	22.7	31.5
DISAGREE SOMEWHAT	3.00	134	29.3	32.0	63.5
DISAGREE STRONGLY	4.00	153	33.5	36.5	100.0
NO ANSWER	-9.00	4	.9	MISSING	
NOT SURE	-8.00	34	7.4	MISSING	
	TOTAL	457	100.0	100.0	

VALID CASES 419 MISSING CASES 38

WIRETAPS WIRETAPS THREAT TO HONEST PEOPLE

VALUE LABEL	VALUE	FREQUENCY	PERCENT	VALID PERCENT	CUM PERCENT
AGREE STRONGLY	1.00	115	25.2	27.0	27.0
AGREE SOMEWHAT	2.00	115	25.2	27.0	54.0
DISAGREE SOMEWHAT	3.00	110	24.1	25.8	79.8
DISAGREE STRONGLY	4.00	86	18.8	20.2	100.0
NO ANSWER	-9.00	9	2.0	MISSING	
NOT SURE	-8.00	22	4.8	MISSING	
	TOTAL	457	100.0	100.0	

VALID CASES 426 MISSING CASES 31

CHGJUDGE JUDGE CHARGED JUDGE GUILTY

VALUE LABEL	VALUE	FREQUENCY	PERCENT	VALID PERCENT	CUM PERCENT
AGREE STRONGLY	1.00	40	8.8	9.9	9.9
AGREE SOMEWHAT	2.00	78	17.1	19.4	29.3
DISAGREE SOMEWHAT	3.00	162	35.4	40.2	69.5
DISAGREE STRONGLY	4.00	123	26.9	30.5	100.0
NO ANSWER	-9.00	9	2.0	MISSING	
NOT SURE	-8.00	45	9.8	MISSING	
	TOTAL	457	100.0	100.0	

VALID CASES 403 MISSING CASES 54

STINGBAD STINGS ENTRAP HONEST PEOPLE

VALUE LABEL	VALUE	FREQUENCY	PERCENT	VALID PERCENT	CUM PERCENT
AGREE STRONGLY	1.00	40	8.8	10.1	10.1
AGREE SOMEWHAT	2.00	65	14.2	16.4	26.4
DISAGREE SOMEWHAT	3.00	140	30.6	35.3	61.7
DISAGREE STRONGLY	4.00	152	33.3	38.3	100.0
ILLEGIBLE	Illegible	15	3.3	MISSING	
REFUSED	Illegible	Illegible	Illegible	Illegible	
	TOTAL	457	100.0	100.0	

VALID CASES 397 MISSING CASES 60

CHARGED GOVT BRINGS TO TRIAL PROB GUILTY

VALUE LABEL	VALUE	FREQUENCY	PERCENT	VALID PERCENT	CUM PERCENT
AGREE STRONGLY	1.00	30	6.6	7.1	7.1
AGREE SOMEWHAT	2.00	87	19.0	20.5	27.5
DISAGREE SOMEWHAT	3.00	147	32.2	34.6	62.1
DISAGREE STRONGLY	4.00	161	35.2	37.9	100.0
NO ANSWER	-9.00	7	1.5	MISSING	
NOT SURE	-8.00	24	5.3	MISSING	
REFUSED	-7.00	1	.2	MISSING	
	TOTAL	457	100.0	100.0	

VALID CASES 425 MISSING CASES 32

PROSOUT OUT OF TOWN PROSECUTORS DON'T KNOW

VALUE LABEL	VALUE	FREQUENCY	PERCENT	VALID PERCENT	CUM PERCENT
AGREE STRONGLY	1.00	112	24.5	28.2	28.2
AGREE SOMEWHAT	2.00	138	30.2	34.8	63.0
DISAGREE SOMEWHAT	3.00	98	21.4	24.7	87.7
DISAGREE STRONGLY	4.00	49	10.7	12.3	100.0
NO ANSWER	-9.00	15	3.3	MISSING	
NOT SURE	-8.00	44	9.6	MISSING	
REFUSED	-7.00	1	.2	MISSING	
	TOTAL	457	100.0	100.0	

VALID CASES 397 MISSING CASES 60

HEARDOF HEARD OF COLLINS CASE

VALUE LABEL	VALUE	FREQUENCY	PERCENT	VALID PERCENT	CUM PERCENT
YES	1.00	242	53.0	56.5	56.5
NO	2.00	186	40.7	43.5	100.0
NO ANSWER	-9.00	3	.7	MISSING	
NOT SURE	-8.00	24	5.3	MISSING	
REFUSED	-7.00	2	.4	MISSING	
	TOTAL	457	100.0	100.0	

VALID CASES 428 MISSING CASES 29

MIND1 FIRST THING THAT COMES TO MIND ON COLLINS

VALUE LABEL	VALUE	FREQUENCY	PERCENT	VALID PERCENT	CUM PERCENT
	.00	7	1.5	4.3	4.3
HEARD ABOUT	1.00	6	1.3	3.7	8.0
HIGH RESPONSIBILITY	2.00	2	.4	1.2	9.3
WITNESS KNOWN FELON	3.00	1	.2	.6	9.9
INNOCENT TILL PROVEN	4.00	26	5.7	16.0	25.9
DISHONESTY HIGH OFF	5.00	9	2.0	5.6	31.5
ILLEGIBLE	Illegible	Illegible	Illegible	8.6	40.1
MAKE EXAMPLES OF HIM	7.00	Illegible	Illegible	Illegible	Illegible
KNOW HIM PERSONALLY	8.00	4	.9	2.5	43.8
BETRAYED PUBLIC TRUS	9.00	7	1.5	4.3	48.1
NOTHING WILL BE DONE	10.00	2	.4	1.2	49.4
HEAR NOT ALWAYS TRUE	11.00	3	.7	1.9	51.2
POSSESSION MEANS GUI	12.00	4	.9	2.5	53.7
COLLINS PERSECUTED	13.00	1	.2	.6	54.3
SET UP OR IGNORANT	15.00	1	.2	.6	54.9
SURPRIZED HES CORRUP	16.00	6	1.3	3.7	58.6

HE'S NOT GUILTY	17.00	2	.4	1.2	59.9
RACISM	18.00	3	.7	1.9	61.7
PLAIN STEALING	19.00	1	.2	.6	62.3
TYPICAL LAW POLITICS	20.00	13	2.8	8.0	70.4
HISTORY LA CORRUPTION	21.00	1	.2	.6	71.0
PROBABLY GUILTY	22.00	32	7.0	19.8	90.7
KNEW GARY YOUNG	23.00	3	.7	1.9	92.6
IF GUILTY PUNISH	24.00	5	1.1	3.1	95.7
BIGOTRY	25.00	3	.7	1.9	97.5
TOO BAD GOT CAUGHT	26.00	1	.2	.6	98.1
COVER UP	28.00	1	.2	.6	98.8
MEDIA MAKE IT BIG	29.00	2	.4	1.2	100.0
NO RESPONSE	-9.00	216	47.3	MISSING	
NOT SURE	-8.00	76	16.6	MISSING	
REFUSED	-7.00	3	.7	MISSING	
	TOTAL	457	100.0	100.0	

VALID CASES 162 MISSING CASES 295

MIND2 SECOND THING THAT COMES TO MIND

VALUE LABEL	VALUE	FREQUENCY	PERCENT	VALID PERCENT	CUM PERCENT
HIGH RESPONSIBILITY	2.00	2	.4	4.2	4.2
WITNESS KNOWN FELON	3.00	1	.2	2.1	6.3
INNOCENT TILL PROVEN	4.00	1	.2	2.1	8.3
DISHONESTY HIGH OFF	5.00	4	.9	8.3	16.7
ENTRAPMENT	6.00	1	.2	2.1	18.8
MAKE EXAMPLE OF HIM	7.00	1	.2	2.1	20.8
KNOW HIM PERSONALLY	8.00	1	.2	2.1	22.9
BETRAYED PUBLIC TRUS	9.00	4	.9	8.3	31.3
NOTHING WILL BE DONE	10.00	2	.4	4.2	35.4
HEAR NOT ALWAYS TRUE	11.00	1	.2	2.1	37.5
COLLINS PERSECUTED	13.00	2	.4	4.2	41.7
RESPECT COLLINS	14.00	1	.2	2.1	43.8
SET UP OR IGNORANT	15.00	2	.4	4.2	47.9
PLAIN STEALING	19.00	2	.4	4.2	52.1
HISTORY LA CORRUPTIO	21.00	5	1.1	10.4	62.5
PROBABLY GUILTY	22.00	3	.7	6.3	68.8
IF GUILTY PUNISH	24.00	3	.7	6.3	75.0
BIGOTRY	25.00	6	1.3	12.5	87.5
MOST NOT CAUGHT	27.00	2	.4	4.2	91.7
MEDIA MAKE IT BIG	29.00	4	.9	8.3	100.0
NO RESPONSE	-9.00	405	88.6	MISSING	
NOT SURE	-8.00	1	.2	MISSING	
REFUSED	-7.00	3	.7	MISSING	
	TOTAL	457	100.0	100.0	

VALID CASES 48 MISSING CASES 409

GUILTY1 IS JUDGE COLLINS GUILTY?

VALUE LABEL	VALUE	FREQUENCY	PERCENT	VALID PERCENT	CUM PERCENT
DEFINITELY GUILTY	1.00	48	10.5	18.5	18.5
PROBABLY GUILTY	2.00	184	40.3	71.0	89.6
ILLEGIBLE	Illegible	Illegible	Illegible	8.5	98.1
NO ANSWER	-9.00	63	13.8	MISSING	
NOT SURE	-8.00	129	28.2	MISSING	
REFUSED	-7.00	6	1.3	MISSING	
	TOTAL	457	100.0	100.0	

VALID CASES 259 MISSING CASES 198

ROSSGLTY IS ROSS GUILTY?

VALUE LABEL	VALUE	FREQUENCY	PERCENT	VALID PERCENT	CUM PERCENT
DEFINITELY GUILTY	1.00	57	12.5	21.3	21.3
PROBABLY GUILTY	2.00	197	43.1	73.5	94.8
PROBABLY NOT GUILTY	3.00	12	2.6	4.5	99.3
DEF NOT GUILTY	4.00	2	.4	.7	100.0
NO ANSWER	-9.00	55	12.0	MISSING	
NOT SURE	-8.00	127	27.8	MISSING	
REFUSED	-7.00	7	1.5	MISSING	
	TOTAL	457	100.0	100.0	

VALID CASES 268 MISSING CASES 189

TAPGUILT DO WIRETAPS MAKE YOU THINK MORE OR LESS

VALUE LABEL	VALUE	FREQUENCY	PERCENT	VALID PERCENT	CUM PERCENT
MORE LIKELY GUILTY	1.00	173	37.9	45.4	45.4
LESS LIKELY GUILTY	2.00	25	5.5	6.6	52.0
NO EFFECT	3.00	183	40.0	48.0	100.0
NO ANSWER	-9.00	23	5.0	MISSING	
NOT SURE	-8.00	45	9.8	MISSING	
REFUSED	-7.00	8	1.8	MISSING	
	TOTAL	457	100.0	100.0	

VALID CASES 381 MISSING CASES 76

DEFGUILT REPUTATION OF WITNESS (YOUNG) MAKE COLLINS MORE OR LESS GUILTY

VALUE LABEL	VALUE	FREQUENCY	PERCENT	VALID PERCENT	CUM PERCENT
MORE LIKELY GUILTY	1.00	80	17.5	21.1	21.1
LESS LIKELY GUILTY	2.00	48	10.5	12.6	33.7
NO EFFECT	3.00	252	55.1	66.3	100.0
NO ANSWER	-9.00	19	4.2	MISSING	
NOT SURE	-8.00	48	10.5	MISSING	
REFUSED	-7.00	10	2.2	MISSING	
	TOTAL	457	100.0	100.0	

VALID CASES 380 MISSING CASES 77

DEFENSE FBI ENTRAP BLACKS ARGUMENT MAKE COLLINS MORE OR LESS GUILTY

VALUE LABEL	VALUE	FREQUENCY	PERCENT	VALID PERCENT	CUM PERCENT
MORE LIKELY GUILTY	1.00	35	7.7	9.1	9.1
LESS LIKELY GUILTY	2.00	47	10.3	12.2	21.2
NO EFFECT	3.00	304	66.5	78.8	100.0
NO ANSWER	-9.00	21	4.6	MISSING	
NOT SURE	-8.00	40	8.8	MISSING	
ILLEGIBLE	Illegible	Illegible	Illegible	MISSING	
	TOTAL	457	100.0	100.0	

VALID CASES 386 MISSING CASES 71

GUILTY2 STIFF SENTENCE ARGUMENT MAKE COLLINS MORE OR LESS GUILTY

VALUE LABEL	VALUE	FREQUENCY	PERCENT	VALID PERCENT	CUM PERCENT
DEFINITELY GUILTY	1.00	35	7.7	16.9	16.9
PROBABLY GUILTY	2.00	116	25.4	56.0	72.9
PROBABLY NOT GUILTY	3.00	45	9.8	21.7	94.7
DEF NOT GUILTY	4.00	11	2.4	5.3	100.0
NO ANSWER	-9.00	82	17.9	MISSING	
NOT SURE	-8.00	158	34.6	MISSING	
REFUSED	-7.00	10	2.2	MISSING	
	TOTAL	457	100.0	100.0	

VALID CASES 207 MISSING CASES 250

NEWSFAN DO YOU FOLLOW THE NEWS

VALUE LABEL	VALUE	FREQUENCY	PERCENT	VALID PERCENT	CUM PERCENT
A LOT	1.00	252	55.1	57.3	57.3
A LITTLE	2.00	173	37.9	39.3	96.6
NOT AT ALL	3.00	15	3.3	3.4	100.0
NO ANSWER	-9.00	4	.9	MISSING	
NOT SURE	-8.00	1	.2	MISSING	
REFUSED	-7.00	12	2.6	MISSING	
	TOTAL	457	100.0	100.0	

VALID CASES 440 MISSING CASES 17

PAPER1 FIRST MOST READ NEWSPAPER

VALUE LABEL	VALUE	FREQUENCY	PERCENT	VALID PERCENT	CUM PERCENT
	.00	45	9.8	10.5	10.5
TIMES PICAYUNE	1.00	317	69.4	74.1	84.6
THE LOBSTER	2.00	1	.2	.2	84.8
US NEWS	4.00	1	.2	.2	85.0
BATON ROUGE ADVOCATE	5.00	2	.4	.5	85.5
CENTURY NEWS	6.00	1	.2	.2	85.7
DAILY COMET	7.00	8	1.8	1.9	87.6
HOMER COURIER	8.00	15	3.3	3.5	91.1
USA TODAY	9.00	1	.2	.2	91.4
TV NEWS	10.00	3	.7	.7	92.1
DAILY STAR	11.00	9	2.0	2.1	94.2
DAILY NEWS	13.00	4	.9	.9	95.1
LOCAL PAPER	14.00	8	1.8	1.9	97.0
LOUISIANA WEEKLY	15.00	2	.4	.5	97.4
ADVOCATE	20.00	5	1.1	1.2	98.6
WALL ST JOURNAL	21.00	3	.7	.7	99.3
LA FOURCHE GAZETTE	22.00	1	.2	.2	99.5
NEW ORLEANS WEEKLY	24.00	1	.2	.2	99.8
ALL OTHERS	25.00	1	.2	.2	100.0
NO ANSWER	-9.00	17	3.7	MISSING	
ILLEGIBLE	-7.00	12	2.6	MISSING	
	TOTAL	457	Illegible		

VALID CASES 428 MISSING CASES 29

APPENDIX G

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

APPENDIX H

91-3778

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-3778

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ROBERT F. COLLINS AND JOHN H. ROSS,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF LOUISIANA

ORIGINAL BRIEF ON BEHALF OF
ROBERT F. COLLINS

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

Judge Robert F. Collins – Defendant-Appellant

John H. Ross – Defendant-Appellant

Judge Joseph H. Young – District Court Judge

Judge Charles Clark – Fifth Circuit Judge Involved In Investigative Stages

Judge John M. Duhe – Fifth Circuit Judge Involved In Investigative Stages

Ralph Capitelli – Defense Counsel

Julian R. Murray, Jr. – Defense Counsel

Kern A. Reese – Defense Counsel

S. C. Garcia, III – Defense Counsel

Frank J. Uddo – Defense Counsel

James M. Cole – Government Counsel

John M. Campbell – Government Counsel

Raymond N. Hulser – Government Counsel

REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests oral argument so that counsel may directly address the issues presented in this appeal, which are not only unique but also, in some ways, novel. Appellant believes that oral argument will provide this Court with an opportunity for thorough discussion of the issues.

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STATEMENT OF JURISDICTION

This Honorable Court has jurisdiction over this matter because it is a final judgment pursuant to 28 U.S.C. Section 1291.

I. STATEMENT OF ISSUES

1) Whether the prosecution's actions throughout this case amounted to prosecutorial misconduct that violated Judge Robert F. Collins' Constitutional rights to due process and a fair trial, especially in light of the independence of the judicial branch of government.

2) Whether the government's polling of potential jurors in the Eastern District of Louisiana violated Judge Collins' right to due process and a fair trial under the Constitution.

3) Whether the prosecution's use of peremptory challenges to exclude blacks from the jury coupled with the unreasonable explanations provided by the prosecution for the use of these challenges and the trial court's improper procedure in handling defendant's objections violated *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986).

4) Whether the misconduct of jury member and foreperson Donna Turner in failing to reveal to the trial court her prejudices against the defendant constituted a defect affecting the fairness of the trial and actual bias requiring reversal of the verdict and a new trial in this matter.

5) Whether the trial court erred in failing to suppress statements made by Judge Collins following his seizure on August 10, 1990.

6) Whether the trial court erred in failing to suppress the evidence produced from government wiretaps.

7) Whether the comment by the prosecutor in his rebuttal argument that Judge Collins failed to take the stand and testify in his own behalf violated the defendant's right not to testify and presumption of innocence under the Constitution.

8) Whether the use of the pre-sentencing guideline crime of Gary Young as a basis for the offense level for sentencing under the Sentencing Guidelines violated the defendant's due process, necessitating that the sentence be vacated and defendant be resentenced.

II. STATEMENT OF THE CASE

A) COURSE OF PROCEEDINGS AND DISPOSITION IN COURT BELOW

United States District Judge Robert F. Collins with co-defendant John H. Ross were indicted in the above-captioned matter on May 8, 1991. Both pleaded not guilty.

Defendants filed motions for pre-trial discovery and for disclosure of Jencks and *Brady* material. Defendants also filed motions to suppress oral statements, to suppress wiretap evidence, and to dismiss the indictment on grounds of governmental misconduct. Following a hearing the trial court denied these motions on May 1, 1991. Trial began on June 17, 1991. At the trial's conclusion, the jury returned a verdict of guilty on all counts.

Subsequently, defendants filed a motion for new trial on various issues, including *Batson* violations, violations of Judge Collins' Fifth Amendment right not to testify, constitutional violations due to government polling of potential jurors, and juror misconduct. The district court also denied this motion following an evidentiary hearing on September 5, 1991.

Judge Collins was subsequently sentenced to a term of imprisonment of 60 months as to count 1, 82 months as to count 2 and 60 months as to count 3, with sentence of imprisonment imposed on counts 1 and 3 to run concurrently with the sentence imposed on count 2.

B) STATEMENT OF FACTS

The government's case rested almost entirely upon its informant Gary Young. Young was a convicted dope dealer who had done time not only for drug offenses but also for contempt of court when he refused to testify regarding others who were involved in drug transactions. (Vol 10, p. 3-6; Vol. 11, p. 108109, 136.) He was a prime suspect in the murder of another government informant who was scheduled to testify against him before a grand jury. (Record 584; Vol. 7, p. 27-29.) While on probation for

the first drug offense, Young was involved in a series of additional drug transactions that were under investigation by the federal government. However, the only potential witness against him was a co-conspirator by the name of Roy Anselmo who had fled the country. (Vol. 10, p. 18; Vol 14, p. 112-119.)

Therefore, Young was able to operate with impunity while Anselmo was at large. One of the things he did was to form a partnership with a real estate investor by the name of John Yemelos and they together with a third party invested over one million dollars in drug money in a New Orleans restaurant called Bart's located at the lakefront. (Vol. 11, p. 25-26.) Bart's was situation [sic] on land owned by the New Orleans Levee Board and therefore much of its operations became under the purview of the Board and its officials. The co-defendant in the instant case, John Ross, was the Vice President of the New Orleans Levee Board and on many occasions had to do business with Yemelos, and to a lesser extent Young. (Vol. 13, p. 3-13.) Yemelos held himself out to be the owner of Bart's so as to disguise the source of the drug money which was being laundered through the restaurant. (Vol. 11, p. 26-32; Vol. 23, p. 145.)

In July of 1989 Anselmo was in Miami, Florida after arranging to reenter the country. (Vol. 16, p. 147-148.) When this came to Young's attention it was quickly apparent that Anselmo would testify against him and he shortly was going to be prosecuted for his additional drug violations. He, therefore, put in a series of panic phone calls to his attorney, who at that time was engaged in representing a one Joe Mohwish in Kentucky. (Vol. 14, p. 110-119; Vol. 23, p. 167-168.) According to testimony

from Mohwish Young's attorney told him about efforts to get Anselmo moved from a jail in St. Tammany Parish to Orleans parish so that he (Young) could have Anselmo killed. (Vol. 7, p. 26-27.) Young's attorney denied that the conversation took place. He did concede that at the urging of Mr. Young he met with federal prosecutors and agents in an effort to see if he could make any type of deal for Young. (Vol. 23, p. 137.)

So prominent was Young as a federal target that the meeting was attended by numerous federal agents from different agencies. Their initial response to the overtures by Young's attorney was that they were not interested in any deals because Young had nothing which they wanted. However, Young was not asking for any concessions but merely an opportunity to "try" to come up with something that would be of interest to the government. The only commitment that he requested, and was given, was that when he was charged the government would not object to his case being transferred to the Court of Judge Robert Collins. After being given that concession it was arranged that Young would meet with FBI agent Freddie Cleveland for the purpose of being debriefed (Vol. 16, p. 150-153) and exploring what possible cooperation Young could give. (Vol. 21, p. 93-94.)

However, before that meeting could even take place Young contacted John Ross. He knew that Ross was a friend of Judge Collins. Although he was to later demonstrate that he had the equipment and the ability to surreptitiously record conversations he did not record the first meeting with John Ross. According to the later testimony from Ross, Young at this first meeting explained that he was going to be charged in federal court and he

discussed with Ross the possibility of bribing Judge Collins. Ross testified that he flatly rejected those overtures as well as later overtures by Young over the telephone and told Young that neither he nor Judge Collins would be any part of such activities. (Vol. 13, p. 17-20.)

Apparently Ross's description of the telephone conversations must have been accurate because the very next day Young went to meet with his partner in the laundering of drug money, John Yemelos. (Vol. 21, p. 100-107.) When not involved with drug dealers Yemelos was a real estate developer and had been quite successful with a number of projects before the collapse of the real estate market. In that regard, he had been involved in arrangements with John Ross to form a minority contracting and maintenance company. Ross, who is black, in addition to being vice president of the levee board was a successful real estate agent and it was their thought that with Yemelos funding the company and Ross running it, they could successfully get a lot of the work available to minority owned companies. The company was to be named Mahogany, Inc., and the legal work to form the company was accomplished by Yemelos' attorney. (Vol. 13, p. 22-26.)

Yemelos took the Fifth Amendment when he was called to testify regarding the formation and funding of the company (Vol. 25, p. 6), but another contractor who had been consulted at the inception of the project was able to verify Ross's testimony. Mr. Larry Gibbs testified that he met with Yemelos and Ross long before any "bribe" conversations took place and they had in fact discussed with him their concept. (Vol. 25, p. 295-296.)

The formation of the company was important because it explains the later actions of Ross. The day after Ross rejected the overtures of Young to discuss with Judge Collins the fixing of Young's case, Young went to his partner Yemelos and complained bitterly. He was urging Yemelos to intercede with Ross to get Ross to help him with his legal problems. He complained to Yemelos that that "nigger won't talk to me." In that conversation which Young was recording unbeknownst to Yemelos he explained that Ross was a "nigger" and since Collins was a black judge "they" could talk to each other. Yemelos agreed that he would talk to Ross and see if he could get Ross to cooperate with Young. (Record 1088, Exhibits 5A and 5B; Vol. 11, p. 94.)

In a subsequent meeting with Ross, Yemelos did in fact ask Ross to see if he could not assist Young with his legal problems. Yemelos explained to Ross – based upon information he had been given by Young – that Young's legal problems were not serious and simply requested that if Young's case went to Judge Collins that he put in a good word for him. Nothing was suggested about anything improper, much less a bribe. In that same conversation, however, Yemelos pointed out to Ross that although he was going forward with Mahogany, Inc. per their agreement, he was turning over the funding of that project to his partner Gary Young. Therefore, Ross was relegated to dealing with Young. (Vol. 13, p. 20-22.)

In the following meeting between Young and Ross, which Young recorded, he offered Ross the agreed upon $100,000.00 but he tied it to the condition that Ross help him with Judge Collins. In this conversation where he offered Ross the $100,000.00 he stated that he might not

even be charged (although he knew from conversations with his attorney that that was not true) and even if he were charged it would be with something minor like a tax violation (which he also knew was not true.) In that conversation Ross did agree to help Young but nothing was suggested about any bribe of Collins. (Vol. 13, p. 29-31.)

All of the foregoing conversations and meetings took place within days of Mr. Young's attorney getting agreement from the government that they would have his case transferred to Judge Collins. This also took place before Young had met with Agent Cleveland to be debriefed. Young did call Cleveland on an emergency basis before going to the meeting with Yemelos. Agent Cleveland denied giving Young permission to record any of the meetings or to offer Ross $100,000.00 for his assistance. Nevertheless Agent Cleveland did concede that at the time these actions were taking place Young was operating as a cooperating individual on behalf of the federal government. (Vol. 8, p. 39-40, 41, 45.)

In none of the foregoing conversations was there any hint or suggestion that Judge Collins was part of, or knew anything about, what Ross was discussing. Indeed there was nothing in those conversations that in any way indicated that anything was taking place other than Ross "running his mouth" about how close he was with Judge Collins. He also was to brag about his friendship with a number of judges, both federal and state, but Young was to carefully steer him away from those persons and direct him to the one judge to whom he had made arrangements to have his case transferred. (Vol. 13, p. 36-37.)

In a series of subsequent recorded conversations between Ross and Young, Young began to make payments to Ross regarding the promised $100,000.00 and he became much more direct in characterizing the payments as being bribes to Ross for assistance with his case when it came up before Judge Collins. Ross testified that he never had any intention of bribing Judge Collins. To the contrary he felt as though Young was trying to "con" him by improperly tying in the funding of Mahogany, Inc., to his (Young's) federal prosecution. Therefore, Ross testified that he felt justified in likewise conning Young that he was going to bribe Judge Collins. (Vol. 13, p. 39-40, 70-85-88.)

Ross and Judge Collins had in fact been friends for a number of years. As a real estate agent Ross had purchased and sold property for Judge Collins, and when he was an attorney Judge Collins had done legal work for Ross. In addition to that home the Judge also had some rental property which he had been attempting to sell for sometime. Vol. 13, p. 42-44, 71.)

As Ross was receiving money from Young he set up a series of meetings with Judge Collins in which he discussed the purchase of the Judge's rental property. In these same meetings he would also discuss his "friend" Gary Young whose case was pending before Judge Collins. Ross testified that Judge Collins' advice to Ross was that if he wanted to assist his friend he should urge him to cooperate fully with the government. That advice is confirmed in a number of conversations that Ross had with Young. (Vol. 13, p. 42-43, 67-73.)

The FBI was to ultimately get a warrant to tap the office and home phones of Judge Collins and John Ross and a number of conversations between the two were recorded. Nothing improper or illegal is ever discussed in those conversations. To the contrary, many of the conversations clearly are related to Ross purchasing the Judge's property. (Vol. 13, p. 140-148; Tapes Between Judge Collins and John Ross.)

At a meeting on May 23, 1990, at Pete's Pub, a restaurant near the federal courthouse, Ross delivered to Judge Collins what he described as partial down payment on the Judge's property. However, it had been agreed that the Judge would carry the financing himself on the property and therefore Ross was supposed to pay one-third down. The payment did not constitute that amount but Ross promised him that the remainder would be forthcoming. Judge Collins therefore put the money in his credenza where it stayed, with the exception of a few hundred dollars which he used when he want on vacation to Europe. (Vol. 13, p. 43-49.)

When he returned from vacation one of the first matters that Judge Collins had before him was the sentencing of Gary Young. He reviewed the pre-sentence report and discovered that all of the information that Ross had been giving him about Young being an upstanding citizen was completely false. To the contrary, he was coming before the Court convicted of his second drug offense. Judge Collins therefore met with Ross and explained to him the information contained in the pre-sentence report and why he was not going to be able to give any consideration to Ross's friend, Young. For his part, Ross took that information and turned it around to use for his

benefit. He was attempting to get the last of the promised $100,000.00 from Young and in recorded conversations he was pointing out to Young all of the confidential information in the pre-sentence report which Judge Collins had explained to him. (Vol. 13, p. 50-53, 73-76.)

In an earlier luncheon meeting at the St. Charles Restaurant Ross pays to Judge Collins the remainder of the down payment on the property. At this meeting there were extensive discussions regarding not only Ross's purchase of the property but problems that Judge Collins was having with a family member to whom he had agreed to sell the property. The Judge's cousin and his wife were seriously injured in an automobile accident and had a substantial personal injury claim which he had been promising the Judge was close to settlement. Nevertheless, the settlement had not come through. (Vol. 13, p. 48-49; Vol. 25, p. 163-177.)

The FBI which had had as many as 50 agents working on the investigation – including two surveillance airplanes – knew from listening in to the recorded conversations between Judge Collins and Mr. Ross that the meeting at the St. Charles Restaurant was scheduled. Nevertheless they had only one agent in the restaurant at the time. Although the restaurant was only one-third filled and there were empty table in various locations, the Bureau made no efforts to record the conversation. While Agent Cleveland acknowledge that the FBI had the most sophisticated equipment and the best trained agents he maintained that logistically it was not possible to surreptitiously record the conversation. The defense was able to show at trial with the use of a local sound expert that under identical circumstances not only was it possible to

record the conversation but it could also be videotaped without anyone seeing it. (Vol. 8, p. 101-102; Vol. 23, p. 44-45, 61-87; Vol. 25, p. 301-333.)

Out of the $100,000.00 which the government paid to Ross, Judge Collins only got $17,500.00, which was one-third of the purchase price of this property. More importantly the sentence which Judge Collins gave to Young was entirely correct. While it was lower than that which was recommended by the probation office it was conceded by all witnesses that Judge Collins was a light sentencer. The chief probation officer testified that the sentence fell in the middle of the parole guidelines and even Gary Young's attorney testified that the sentence was exactly what he would expect from Judge Collins under ordinary circumstances. (Vol. 13, p. 152-154; Vol. 16, p. 142; Vol. 21, p. 94; Vol. 23, p. 164.)

After the sentence Gary Young was "frantically" trying to reach John Ross pretending to be concerned about the length of his sentence. Interestingly Ross did not call Judge Collins to find out what the sentence was, but rather called Gary Young's attorney to get the information. When talking to Young he pretended like he had been in touch with Judge Collins regarding the sentence, but in fact the FBI surveillance showed that there was no contact or conversations between them from the time of the sentence to the time of Ross's conversation with Young. (vol. 13, p. 53, 76.)

Young then made the final payment on the $100,000.00 to Ross requesting that Ross discuss with Judge Collins the possibility of reducing the sentence. Ross did no more than go to Judge Collins and discuss

with him a "Rule 35" (the motion for reduction of sentence which Young had explained to Ross was the correct procedural vehicle.) Judge Collins responded to Ross that Young had the same right as any other citizen to file the motion for reduction but the sentence which he imposed was correct and he had no intention of changing it. (Vol. 13, p. 55-56.)

The FBI did not wait to see if in fact Judge Collins was going to reduce the sentence, or if in fact the transfer of the property was going to take place. Rather, they immediately got search warrants for the home, person, and chamber of Judge Collins.

Three FBI cars with six agents – one with his gun drawn-forced Judge Collins' car to a halt after he left the federal courthouse. He was stopped in front of the offices of Deutch, Kerrigan & Stiles, one of the largest law firms in New Orleans, and was held there awaiting the arrival of other agents. He was then transported back to his chambers in front of the public and courthouse security. His chambers were searched and the money which he was holding in his credenza was seized. Judge Collins advised the agents that he did not wish to discuss the matter until he had first spoken with an attorney and they appropriately acquiesced in that decision. (Record 521 and Exhibits Attached; Vol. 8, p. 15-16.)

Nevertheless Agent Cleveland interrogated Judge Collins when he was being transported from the place where he was stopped to his chambers he was questioned as to whether he had any business relations with John Ross, and the Judge supposedly denied that he did. However, in those allegedly inculpatory statements, as well as

similar ones supposedly made by John Ross, it is clear that the agents were questioning both defendants regarding documents they were seeking in relation to search warrants they were executing. (Record 521 and Exhibits Attached.) Ross testified that he denied having a real estate transaction with Judge Collins, but rather was denying that he had any documents regarding same. (Vol. 13, p. 59-60.) In any event the government was never able to offer any explanation as to why Judge Collins and Mr. Ross would supposedly devise the real estate transaction as a guise to fool the authorities and then when questioned would deny the existence of that very same transaction.

After completing their search there was, of course, conversation all over the courthouse, and over newspaper articles about the search. However, within a few days there were television news reports that described the government's investigation in specific detail. Indeed the reports were so specific that the source had to have been from the government. For example, the day before the sentencing of Young Judge Collins called First Assistance [sic] United States Attorney Albert Winters to ask him where the cooperation letter was regarding Gary Young. That call was perfectly reasonable because it was Winters who had requested Judge Collins to accept the transfer of the Young case and, of course, Judge Collins understood from John Ross that Young was in fact cooperating. However, Winters was working actively with the government's sting operation against Collins and therefore lied to the Judge and told him that no cooperation letter was being sent because none of the information given by Young was useful to the government. (Vol. 14, p.

34-39, 53-55; Vol. 16, p. 175-183.) Only Judge Collins, Mr. Winters, the prosecution and the agents regarding the Judge's phone conversations knew what had been said. However, the telecast reported in detail the particulars of that conversation.

Judge Collins was being convicted by the "gloating press" before he had even been indicted, much less tried. Defense counsel for the Judge complained about this reprehensible conduct of the Office of Professional Responsibility, United States Department of Justice. Members of that unit promised to investigate this flagrant abuse and notify the defense of its findings. There has been no response to date. (Record 584.)

News reports of the investigation and indictment were carried nation wide and they noted that Judge Collins was black. Defense counsel received a telephone call from Joe Mohwish who was the defendant in the federal prosecution in Kentucky who was represented by the same attorney that represented Gary Young. Young had not been mentioned in the Associated Press story that Mohwish read and he inquired of defense counsel as to whether Gary Young was in fact involved in the case. When defense counsel responded that he was Mohwish stated that he thought he had important information for the defense. Counsel for Judge Collins and John Ross went to the federal penitentiary in Atlanta where Mohwish was serving his sentence and interviewed him. (Record 584; Vol. 14, p. 108-110.)

Mohwish stated that because his case was being tried at the same time that Anselmo was giving information regarding Young he (Mohwish) had a number of conversations with his, and Young's, defense counsel. A copy of

the pertinent portion of Mohwish's testimony is attached in the Record Excerpts. In essence he was told by Young's attorney that Young was attempting to get himself out of trouble by "setting up" a black official. In return for doing this Young expected to serve only 18 to 24 months.[1] After Mohwish was convicted Gary Young's defense counsel advised him that if he knew of any black officials that he could turn in he could in all likelihood reach an accommodation with the prosecution because the Justice Department considered them "an endangered species." (Vol. 14, p. 111-121.) He also explained to Mohwish about attempts that had been made to have Anselmo transferred to another prison facility where he could be killed. (Vol. 7, p. 26-27.) The government called Mohwish's defense counsel who denied making any of the statements attributed to him by Mohwish. Yet, the government was unable to suggest any reason why Mohwish, who was already serving a twenty-year sentence (Vol. 14, p. 133) would want to subject himself to a charge of perjury by making up a story that could in no way help him.

III. SUMMARY OF THE ARGUMENT

Judge Robert F. Collins believes that his conviction should be reversed or he should receive a new trial for the following reasons. First, he argues that his conviction

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[1] Young was ultimately to be sentenced to 3 years and since his offense was pre-guideline he is eligible for parole. As a second offender he in all likelihood will not get out after serving one-third of his sentence but will have to serve between 18 and 24 months.

should be reversed because of prosecutorial misconduct that took two forms. Initially, this investigation was begun without any reasonable suspicion that Judge Collins had done or was about to do anything illegal. Therefore, the doctrine of separation of powers in the Constitution protects him from prosecution without such reasonable suspicion. Additionally, the prosecution's actions throughout this proceeding denied Judge Collins' due process and a fair trial.

Also, the government's secret and exclusive use of a poll of potential jurors of the Eastern District of Louisiana violated Judge Collins' due process rights both under the constitution itself and under the doctrine of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963). The prosecution's use of peremptory challenges to exclude blacks from the jury combined with the unreasonable explanations provided by the prosecution for these challenges and the trial court's improper procedure in handling defendant's objections constituted a violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986).

By adoption of the reasons and arguments set forth in the brief of co-appellant John Ross, Judge Collins also argues that the misconduct of jury member and foreperson Donna Turner constituted a defect in the trial and actual bias that should result in a new trial. Additionally, the trial court erred in failing to suppress the evidence in this case produced from government wiretaps. Further, Judge Collins maintains the trial court erred in failing to suppress the statements made by him following his seizure on August 10.

He also argues that the prosecutor's comment during rebuttal argument that Judge Collins failed to take the stand to testify in his own behalf violated his Fifth Amendment right.

Finally, Judge Collins submits that his sentence should be vacated because the trial court erred in using the pre-sentencing guideline crime of Gary Young as a basis for the offense level for sentencing Judge Collins under the sentencing guidelines.

IV. ARGUMENT

A) INTRODUCTION

This court is not so naive as to close its eyes to the attractiveness of a federal judge as a target for over-zealous prosecutors, fueled by a gloating media. *Nixon v. United States*, 703 F.Supp. 538, 572, n. 21 (S.D. Miss. 1988).

Would that it were so. The foregoing quote is by Judge Nangle, sitting by designation to hear the motion of Judge Walter L. Nixon, Jr., to vacate his conviction and sentence pursuant to 28 U.S.C. Section 2255. While Judge Nangle was ultimately to rule against Judge Nixon on the merits of the motion, Judge Nangle's perception was correct in recognizing the potential for abuse when the immense power of the Executive Branch of our government is turned against the Judicial. In this appeal, Judge Robert F. Collins, the first black federal judge appointed in the Deep South, will make the normal, orderly presentation of assignments of error, which will be numbered, segmented and compartmentalized. However, to understand the impact of these issues, it is important for this

court to view them not only individually but also in a context of the totality of conduct by the prosecution. Judge Collins submits that the prosecution approached with a view to win at any cost. Having made this determination and concluded that the ends justified the means, the prosecution ignored Constitutional and legal parameters in this matter.

Judge Collins has not asked for any special consideration because of his position, and he does not do so now. However, he does ask that this court recognize the same realities as Judge Nangle did in the *Nixon* case. The issues are not isolated. The thread of prosecutorial misconduct is woven through each and every issue and stands out through the whole fabric of this case. There is a pattern of improper conduct by the prosecution throughout this case, and it would indeed be naive not to recognize a relationship between that conduct and the prize the prosecutors were pursuing: convicting a federal judge.

B) PROSECUTORIAL MISCONDUCT/SEPARATION OF POWERS

As mentioned, Judge Collins does not seek special consideration because of his position. However, as also noted, he is not so naive to ignore the realities of the situation of the prestige a prosecutor can attain by convicting a federal judge.

Judge Collins also understands (although he does not agree with) the apparent trend among the courts of appeal to reject the belief that the prosecution must have "reasoned grounds" for investigation of an individual under the due process clause. *See United States v. Luttrell,*

923 F.2d 764 (9th Cir. 1991) (*en banc*) and cases cited therein.

However, he raises two related issues herein. First, he adopts the argument of co-appellant John Ross in regard to prosecutorial misconduct. But even more so Judge Collins argues that under the United States Constitution and the separation of powers inherent therein, the Judicial Branch under Article III of the Constitution certainly has a right to be left alone absent some reasonable suspicion on the part of the Executive Branch of government to believe that some offense has been committed.

In this matter there certainly was no reasonable suspicion to believe that he was committing a crime at the time this investigation was begun. The sole allegation upon which this investigation was based was that of Gary Young, a convicted drug smuggler who at the time of the trial of this matter also was shown to be an admitted liar and perjurer. (Vol. 11, p. 126-144.) Young's actions working for the government included the unauthorized taping of a conversation with John Yemelos on his own tape recorder and unauthorized offering of $100,000.00 "supposedly" to John Ross for a bribe. (Vol. 8, p. 39-40, 41.)

Young also testified that he had a conversation in early September 1990 with John Ross in which the bribe was supposedly discussed, but shortly after on September 27, when Young meets with the government to discuss his plea bargain and role as a government undercover agent/informer in other cases, he does not mention the bribe. (Vol. 11, p. 9-10.) The reaction of Assistant United States Attorney Albert Winters, upon first hearing of this supposed bribe of Judge Collins, is

even more telling: Mr. Winters dubbed it "foolishness." (Vol. 14, p. 73-74.)

Further, as delineated in the brief of co-defendant John H. Ross on the issue of suppression of the wiretap evidence and adopted by Judge Collins, Agent Cleveland included in his affidavit seeking wiretap permission innuendo and uninvestigated/unfounded "facts" to support the wiretaps in this matter.

The testimony of convicted felon Joe Mohwish also is important. Joe Mohwish did not have anything to gain from his testimony either at the pre-trial hearing on governmental misconduct and at trial. Both times he stated that in Spring 1990 Frank DeSalvo, attorney for Gary Young, had told Mohwish that Gary Young was going to set up a black politician and in return get a reduced sentence *and* that if Mohwish wanted to do some good for himself, he should try to set up a black official. (Vol. 7, p. 31-32; Vol. 14, p. 119-120, 121.) Mohwish also testified that DeSalvo told him that the Justice Department considered black officials an "endangered species." (Vol. 7, p. 32; Vol. 14, p. 121.)

DeSalvo not surprisingly denied these statements in his testimony (Vol. 23, p. 122.) Yet, the fact that Mr. Mohwish had nothing to gain from his testimony (and, in reality, probably much to lose) and the realities of prosecutions against black officials – 14% of the public corruption prosecutions in five years have targeted black officials who comprise less than 2% of the elected officials in the nation, Curriden, "Selective Prosecution, Are Black Officials Investigative Targets," 78 A.B.A.J. 54 (Feb. 1992) – show that Mohwish was not off base.

Prosecutorial misconduct continued throughout this trial. First, there was the "outrageous" use of a poll of potential jurors with outrageous results, which was withheld from Judge Collins, as set forth herein. The prosecution withheld the 1981 grand jury testimony of Gary Young from the defendant, although it was certainly within their knowledge that Gary Young had testified before a grand jury in the early 1980s after serving time for contempt due to a previous refusal to testify in front of a grand jury. (Vol. 11, p. 132-133.) This is more evidence of prosecutorial misconduct, especially in view of pre-trial requests for *Brady* or *Giglio* material or Jencks Act material. (Record 106, 122.) The prosecution no doubt will argue that it did not know about this grand jury testimony. However, this indicates that the prosecution embraced Gary Young and his allegations without any investigation into his background, including his serving of time for contempt and/or his previous grand jury testimony.

Prosecutorial misconduct continued with the blatant exclusion of blacks on the jury by the government. It ended on another outrageous note, with the prosecution deliberately and with enormous effect (considering the beliefs of almost two-thirds of potential jurors in the Eastern District according to the government's secret poll that defendants have to prove themselves innocent) commenting directly on Judge Collins' exercise of his Constitutional Right not to testify at the trial of this matter.

The prosecutorial misconduct in this case was outrageous from start to finish. The government started the investigation on the baseless, bald-faced allegations of a known drug smuggler and ended with the deliberate

trampling of Judge Collins' constitutional right not to testify. The government wanted to win at all costs.

For this court to allow such a heinous wrongdoing of the Executive Branch against the Judicial Branch is to raise the spectre of investigation of any member of the Judiciary who for whatever reason, politically or otherwise, disagrees with the Executive Branch of the United States. The whole fabric of the nature of the United States, based upon the separation of powers, does not and will not work and will be torn apart if this Court allows the misconduct in this case.

This is not a request for special consideration. This is a plea for this Court to recognize and tell the Executive Branch that it can not and will not permit unreasoned, unfounded allegations to begin investigations against one of its members by a co-equal branch of the government. To do otherwise endangers the balance of powers so wisely crafted by the founding fathers of our Constitutional form of government and transforms the judicial branch into nothing more than a system of political hacks who must agree with the Executive Branch or face the haunting loss of life, liberty or property.

C) GOVERNMENT'S "OUTRAGEOUS" USE OF A POLL OF POTENTIAL JURORS

Prior to the trial of this matter, the defendants learned and brought to the attention of the district court that the government was conducting a poll in regard to the trial of this matter. (Vol. 7, p. 183.) Other than that the government admitted the polling, the defendants did not know the extent of the sampling of the poll, the questions

asked or the poll results. (Vol. 7, p. 183.) At a hearing on May 16, 1991, the district court called the government's poll an "outrageous procedure" and ordered the prosecution to cease polling immediately and give the poll and its results to the court for review. (Vol. 7, p. 188-189.) *Defendants were also ordered not to conduct any poll.* (Vol. 7, p. 185-186.) The trial court "condemned" the government's polling procedure, adding it was inconsistent with the title "Department of Justice" to have the government take a poll. (Vol. 7, p. 188-189.)

Subsequently, in a telephone conference among counsel and the court, on June 5, 1991, the trial court refused to turn over the poll and its results to the defendants. The district court stated that it had reviewed the poll and the results, that nothing had been done to compromise the integrity of the jury and that, if anything, the poll was no more than a "red herring of the first order." *Transcript of Telephone Conference,* June 5, 1991, p. 6-11.[2] Defendants objected to this court's decision during this conference. *Id.* at 11-12. Only after the trial did the district court give the poll and its results to defendants.

The poll and its results (introduced as exhibits at the hearing on defendants' Motion for New Trial, Record 1379, Exhibits 2 and 3, and attached hereto in the Record Excerpts) were not a "red herring" but a subtle, invasive

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[2] Through an inadvertent error, the transcript of this phone conference was not included in the record. Appellant has filed a Motion to Supplement the Record with the trial court to include the transcript in the record. For purposes here, the pertinent portion of the transcript is included in the record excerpts.

and devastating violation of the defendant's Constitutional Rights. The trial court missed the point in concentrating solely on the "integrity of the jury." The poll in its form and substance coupled with the government's exclusive knowledge of the poll results improperly and insidiously infected the trial. The poll violated Judge Collins' due process rights when he was denied access to the poll and its results and ordered not to conduct any polls of his own. The government was given a head start in knowing the attitudes of persons who would be jurors in this matter, especially when the government from the poll knew that most people thought Judge Collins was guilty and a similar percentage thought defendant Ross was guilty. (Record 1379, Exhibits 2 and 3, Questions C3. and C4. and Corresponding Answers.)

Even more heinous, however, is that the government was allowed to pick a jury and go to trial with the exclusive knowledge from the poll that two-thirds of those answering believed a defendant had to prove himself innocent, in outright disregard of the presumption of innocence. It is noteworthy that ninety-seven percent of those polled answered this question in regard to the presumption of innocence. (Record 1379, Exhibits 2 and 3, Question B.1. and Corresponding Answer.) Further, this knowledge directly relates to the issue of prosecutorial misconduct in the government's closing argument, as set forth hereafter.

Judge Collins makes two constitutional arguments. First, he submits that the polling and subsequent secret and exclusive use of the poll by the government is a *res nova* issue that in and of itself amounts to a violation of due process under the Constitution and cries out for a

new trial in this case. Second, he submits that the only case law even analogous to this issue supports the argument that failure to turn over the poll and its results to Collins was a violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963).

The defendant has searched but has been unable to find any case law dealing with the equity, much less constitutionality, of the government's secret and exclusive use of a poll to survey the attitude and mind-sets of potential jurors who may sit in trial of criminal defendants. Defendants submit that this polling in and of itself, is a denial of due process.

At the hearing on the Motion for New Trial in this matter, the government's pollster, Dr. John B. McConahay, of Duke University, testified that he transmitted the information in regard to the poll and poll results to the government and had a telephone conversation with the prosecution, at which time he presumed the prosecution circled the answers to certain questions, including the answers to the presumption of innocence questions and the percentage of persons who thought the defendants were guilty. (Vol. 17, p. 64-65.) The government paid Dr. McConahay $19,500.00 for his work. (Vol. 17, p. 40, 63.)

Such intrusion into the mindsets of potential jurors by the government amounts to trial by polling, a denial of due process to the defendant. The government with its vast financial and investigative resources should not be able to pre-try a case to potential jurors to learn their biases and prejudices and lack of knowledge of the Constitution so the government can prey on such mind sets at trial. This is precisely what happened in this case. Judge

Collins was denied due process, and due process should not be limited as long as prosecutors have the imagination to dream up new procedures to use their enormous power against citizens.

In addition to the polling being a denial of due process in and of itself, the enormity of information contained in the poll that was denied to the defendant obviously influenced his strategy. For example, given the overwhelming number of people who believed that Judge Collins was guilty even prior to the trial according to the poll, a change of venue certainly would have been an option that the defendants would have considered. *Cf. United States v. Malmay,* 671 F.2d 869 (5th Cir. 1982).

Further, had Judge Collins known of the poll results, he would have pushed harder for individual *voir dire* of prosecutive jurors, such as the type testified to by the defendant's expert Joe Walker at the Motion for New Trial (Vol. 17, p. 35-36). At least he would have consulted with an expert pollster such as Walker, or some other type of human behavior expert, to assist the defense in understanding the significance of the poll and the most effective way to counteract it when selecting the jury.

Indeed, because the defense did not have access to the poll information but the trial judge did, *he* should have proposed individual *voir dire* for the jurors to explore their biases and prejudices as well as their knowledge, or lack thereof, of the presumption of innocence. This information certainly was not a "red herring."

Possibly the most important decision affected by Judge Collins' lack of knowledge of the poll was his decision not to testify. This was an important, painstaking

decision based on what he thought was the obvious premise that his constitutional right *not* to testify was intact. Little did he know that the potential jurors did not believe this premise.

The defense was doubly prejudiced. Not only was the government allowed to use brass knuckles under its gloves, but the defense was wrongfully reassured by the referee that the gloves had been checked and no foreign object was hidden inside them. After being told the poll and its results were a "red herring," the defense blissfully proceeded into a fight thinking it had no reason to dodge the blows. Putting aside the fact that the defense was prohibited by the trial court from conducting its own poll (Vol. 7, p. 185-186), when Judge Collins was reassured by the trial judge that the poll and its results were nothing more than a "red herring," the defense was not even inclined to poll anyone. Why do so if the trial court was accurate? However, the trial court denied the defense the same knowledge the government had stored away for future use when it chose the jury in this matter and presented its case.

The defense team is not so naive as to believe that all citizens accept the Constitutional principle such as presumption of innocence and burden of proof, but it was truly staggering to see the statistical data indicating such an overwhelming disregard for our Constitutional Rights. In that regard, the defense submits that it was a violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963) and its progeny not to turn over the poll and its results to the defense. This decision by the trial court should be reviewed on a *de novo* basis. *U.S. v. Marashi*, 913 F.2d 724,

732 (9th Cir. 1990); *U.S. v. Buchanan*, 891 F.2d 1436, 1440 (10th Cir. 1989).

Additionally, it was a complete disregard of Brady for the government prosecutors, not to mention the judge, to sit silently while apparently one hundred percent of the venire answered they believed in Constitutional principles when the government and the judge knew from its poll that they did not. Again the judge also erred in not at least questioning prospective jurors individually regarding their beliefs in view of the poll results.

"[O]ne touchstone of a fair trial is an impartial trier of fact – 'a jury capable and willing to decide the case solely on the evidence before it.' " *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 554, 104 S.Ct. 845, 849 (1984) (Citation omitted.). For the government and the trial court to proceed through this trial with the devastating knowledge that an overwhelming majority of potential jurors in the Eastern District of Louisiana did not believe in Constitutional principles without giving this knowledge to the defense team mocks the concepts of due process and fair trial embodied in the Constitution.

Finally, the defendant emphasizes the heinous nature of the type of questions the government asked in the poll. Asking the community about the use of a paid informer such as the government's star witness Gary Young is one matter. (Record 1379, Exhibits 2 and 3, Question C6.) However, for the government to probe citizens to determine how many of them would be willing to violate the Constitution which the prosecutors are sworn to protect is insidious, frightening and Orwellian. Is 1984 here, in

substance if not in form?[3] For the Justice Department to spend almost $20,000.00 of the taxpayer's money to undermine the Constitution is not justice. As the trial judge originally characterized it, this behavior is "outrageous" and inconsistent with the title "Department of Justice."

D) BATSON ISSUE

Judge Collins also contends that his equal protection rights as set forth in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986) were violated when the government used six of its eight peremptory challenges to strike blacks from the jury. (Vol. 9, p. 169.) The flawed procedure by which Judge Collins was restricted in objecting to the government's peremptory challenges as well as the pretextual reasons given by the government for striking these black jurors constitute the basis of this violation necessitating a new trial. The procedure used should be reviewed under a *de novo* standard of review under *Batson*, while the transparency of the government's reasons are reviewed under a clearly erroneous standard. *Hernandez v. New York*, 500 U.S. ___, 111 S.Ct. 1859 (1991).

Initially, Judge Collins was hamstrung by the trial court in objecting to prosecutor's use of peremptory challenges because he did not know who was being stricken, even though Judge Collins excepted to this process. (Vol. 9, p. 154.) Then, only after the venire was dismissed and the jury was sworn were counsel on behalf of Judge

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[3] G. Orwell, *1984* (1949).

Collins given the opportunity to object to the government's use of its peremptory challenges pursuant to *Batson*. (Vol. 9, p. 163, 169-171.) The court with no other argument or hearing on the matter simply reviewed its own notes and denied the motion. (Vol. 9, p. 170-171.) Further, the court allowed the government to put on the record two days after the trial had started its reasons for striking the six blacks peremptorily, and then the court did not rule on Judge Collins' objections until July 5, 1991, six days after the trial concluded. (Vol. 23, p. 179.)[4] This is in direct contradiction to the substance of and procedure contemplated by *Batson*.

Judge Collins was prejudiced in that he was not even allowed to develop a record of purposeful discrimination in support of objections before the venire was dismissed and the jury sworn. The trial court based its decision only on its own notes and did not allow defendants a reasonable opportunity to create a record on this matter. Because the court did not even allow the defendants to object until after it had dismissed the venire and seated the jury, defendants were unable to even request additional *voir dire* to show not only a *prima facie* case of discrimination but also lay the foundation to show that the government's later reasons for using six of its eight peremptory challenges to strike blacks were pretextual. This was the exact purpose of defense counsel's objection

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[4] The transcript of the government's presentation of reasons and the trial court's ruling were both sealed. Appellant believes his presentation of facts herein as to the government's presentation of reasons is correct.

to the method of striking the jurors as it relates to *Batson*. (Vol. 9, p. 154.)

In *United States v. Dawn*, 897 F.2d 1444 (8th Cir. 1990), the appeals court correctly noted that any defendant who requests a *prima facie* finding of purposeful discrimination is obligated to develop a record beyond numbers in support of the asserted violation. *Id.* at 1448. At that point, "the district court, before the venire is dismissed and the jury is sworn, must give the defendant a reasonable opportunity to do so. Such a record will allow the appellate court to review the findings at issue." *Id.* at 1448 – 1449. *See U.S. v. Grandison*, 721 F.Supp. 743, 746 (D.Md. 1988). The trial court's refusal in this case to allow Judge Collins to develop such a record prejudiced him and denied him equal protection under *Batson*.[5] Thus, Judge Collins is entitled to a new trial.

Then, Judge Collins was put into a Catch-22 position two days later when the government, on its own after the

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[5] Judge Collins further notes that the *Manual on Recurring Problems in Criminal Trials*, Federal Judicial Center, 3rd Edition 1990, states the axiomatic procedures for handling potential violations of *Batson* if the court observes one or more than one potential juror of the same cognizable racial group as a defendant being challenged peremptorily by the government. One of the first obligations of the trial court is to disclose the challenges of each side to the other. If defense counsel objects and sets forth a *prima facie* case of purposeful discrimination, the prosecution must *then*, at that time, convince the court that its reasons for peremptorily challenging the particular juror was for a reason or reasons other than that the potential juror was of the same cognizable racial group as the defendant. *Manual on Recurring Problems in Criminal Trials*, Federal Judicial Center, 3rd Edition 1990 at 29-30.

venire had been dismissed, was allowed to put its reasons on the record for dismissing the jurors. (Vol. 23, p. 179.) At this point, once the government provided an explanation for peremptory challenges, there is only a review of the discrimination *vel non*. *United States v. Forbes*, 816 F.2d 1006, 1010 (5th Cir. 1987). However, when the trial court allowed the government to volunteer its reasons case two days after the challenges were made, the venire had already been dismissed. The defendant was unable to question the potential jurors in regard to the government's supposed reasons for challenging them. The procedure was flawed.

Notwithstanding this faulty procedure, the transparency of the pretextual reasons offered by the government in support of their challenges to prospective black jurors is readily apparent.[6] A review of these reasons shows purposeful discrimination *vel non*. For example, one of the reasons given by the government for challenging a juror was because the potential juror was sleeping. Yet, the trial court even noted that it never saw this stricken juror sleeping.

Other examples of this purposeful discrimination are the pretextual nature of the government's striking prospective juror No. 48, a teacher's aid, but not No. 23, a teacher. The government's reason for striking prospective juror No. 48 was that she would be too sympathetic because she helped teach speech therapy. Again, defendants note this reason was not given until two days after the trial began. Yet, No. 48 also was a teacher who could

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[6] See footnote 4.

have been just as sympathetic, under the government's reasoning, because he may teach poor, uneducated persons in a vocational-technical school. In regard to *Batson*, defendants show this Court that No. 48 was black but No. 23 was caucasian.

However, the most transparent and hurtful of the government's pretextual challenges related to the black juror who was an employee at Avondale Industries in New Orleans. At the time he filled out the jury questionnaire he listed his occupation as being "unemployed" but apparently secured a job at Avondale Shipyards during the interim. (Vol. 9, p. 157-158.) When asked his occupation at the time of *voir dire* he responded that he worked as a laborer at Avondale. (Vol. 9, p. 157-158.) Government counsel from Washington, D.C., stated that they sought and received the assistance of the local United States Attorney's Office to help them screen out jurors with potential conflicts. They explained to Judge Young that they were advised by an Assistant United States Attorney that there was a criminal investigation ongoing regarding illegal activities at Avondale and that because of that investigation they were fearful that the juror might have some ill will against the government.

That is absolute rubbish. The Avondale prosecutions were big news when they took place years ago. Not only had Judge Collins handled some of these prosecutions while sitting as a judge, but also two members of his defense team had represented Avondale executives who had been charged. The last prosecutions were over three years ago. One of the defense team represented a defendant named Paul L. Tregre, Jr. in one of the last Avondale cases. Judge Collins asks this court to take judicial notice

that defendant Tregre pleaded *nolo contendere* to four counts of the original indictment on July 9, 1987. A judgment of conviction was entered on September 30, 1987, in *United States v. Paul Tregre*, 87-220, Eastern District of Louisiana. As one of the last prosecutions, this was almost four years before the trial of this case. To suggest that there was an ongoing investigation was an outright misrepresentation.[7]

Even when the investigation was taking place it related only to executives at Avondale who were receiving kickbacks from suppliers and contractors who did business with the shipyard. There would be no reason for the average worker at Avondale to have any hard feelings against the federal government. To the contrary, Avondale Industries is owned by the employees, and the rank and file workers had to applaud prosecution of these executives whose illegal acts were undermining the work of the company. In any event, there would absolutely be no reason to expect that a recently hired laborer would have any concern about the investigation that ended almost four years before he was even hired.

Finally, at the risk of stating the obvious, the defense points out that the government requested no *voir dire* of this prospective juror. If the prosecution seriously was concerned about this juror's being prejudiced against the

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[7] The defense recognizes that every government investigation is always "ongoing" in a sense that if it receives any additional information it is ready and willing to return new indictments. However, that is a far cry from having an active investigation which was being suggested to the trial court in this matter.

government, it certainly would seem that the government would have wanted to have question him on that point. The government quite possibly could have had him excused for cause and would not have even had to challenge him peremptorily. However, government counsel well knew that it was a bogus issue. Had government counsel or the trial court questioned the prospective juror, Judge Collins submits that they would have found out that he knew nothing about any investigation or prosecutions relative to Avondale. The transparent pretext would have become obvious, as would have the racially motivated challenge.

To deny to a black federal judge his Constitutional right to have members of his race on his jury is reprehensible. There is currently no member of the Fifth Circuit Court of Appeals from the Metropolitan New Orleans area and even if there were, there would be no assurance that he or she would be a member of this panel. What is certain, however, is if such a judge were available he or she would not be so naive as to "buy" the "Avondale investigation" basis for excluding the black juror in this matter.

E) MISCONDUCT OF JUROR/FOREPERSON

Judge Collins submits that because the juror/foreperson misconduct delineated and argued in co-appellant John Ross' brief, which is adopted in this issue, Judge Collins should be granted a new trial.

F) SUPPRESSION OF ORAL STATEMENTS

The trial court erred when it failed to suppress oral statements which Judge Collins allegedly made after being seized on August 10, 1990, in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966). The facts as established by the trial court on this issue are subject to a "clearly erroneous" standard of review, but the question of a violation of Miranda is a matter of law meriting de novo review. *U.S. v. Harrell*, 894 F.2d 120, 122-123 (5th Cir. 1990).[8]

On August, 10, 1990, FBI agents forcibly interdicted Judge Collins while he was driving his automobile at the intersection of Julia and Magazine Streets.

After Judge Collins identified himself as a United States District Judge, one of the six agents told him that he knew who Judge Collins was and ordered him from his automobile, taking the keys to the car from Judge Collins. An FBI agent also "touched" Judge Collins' elbow in "guiding" him to the curb, detaining him while waiting for Agent Cleveland to arrive. (Vol. 19, p. 3.) After arriving, Cleveland advised Judge Collins that agents were armed with search warrants for his judicial chambers, residence, automobile and person but, conveniently, he was not under arrest. When Judge Collins inquired as to the reason for the stop and the search warrants, he was advised that he was under investigation

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[8] Judge Collins initially notes that the trial court denied him an evidentiary hearing on this issue, so he is hamstrung in proceeding purely on the government's admissions at the motion argument, the FBI "302" forms, Exhibits attached to Record 521, and Agent Freddie Cleveland's trial testimony.

for accepting monies from John Ross to influence the Judge Collins' sentencing of Gary Young. (Record 521.)

At that point Agent Cleveland advised Judge Collins that he could escort the judge back to his chambers so that his person could be searched these as well as his chambers, to which, according to the FBI, Judge Collins "voluntarily" agreed. Surrounded by FBI agents, Judge Collins was directed to another automobile located directly behind his automobile and placed in the rear seat. At that time Agent Cleveland interrogated Judge Collins while en route to his chambers, concerning the judge's relationship, both business and personal, with John Ross. (Record 521.) Agent Cleveland then took great pains to advise the judge of probable cause, all the while attempting to elicit incriminating remarks from Judge Collins. Indeed, his purpose was to "interview" him before Judge Collins knew about the search warrants. (Vol. 8, p. 88.) Judge Collins was asked if he had discussed the details of any pre-sentence report of Gary Young with John Ross and if he, Judge Collins, had received any monies or other things of value from Ross for the purpose of helping Young. Judge Collins also was asked if he had received any monies at all from Ross and whether or not Judge Collins had any business dealings with Ross. (Record 521.) Agent Cleveland testified as to Judge Collins' responses at the trial of this matter. (Vol. 8, p. 14.)

In chambers, the agents commenced a search of the Judge's desk, credenza and other areas of chambers. (Record 521.) The agents told Judge Collins that he was not under arrest and was free to leave at any time (Vol. 8, p. 17), yet Agent Cleveland also continually advised

Judge Collins that the agents had secured tape recordings and actual observations of Judge Collins receiving monies from John Ross. (Record 521; Vol. 8, p. 89-90.) At one point during the search, Judge Collins requested the use of his restroom, and, after being granted permission by Agent Cleveland, did so. Shortly thereafter Agent Cleveland noticed Judge Collins staring at the ceiling and told him not to stay in the restroom. (Vol. 8, p. 90-91.)

Near the end of the search of the chambers and Judge Collins' person, Agent Cleveland handed Judge Collins a forthwith subpoena for the federal grand jury requesting immediate production of certain documents. (Record 521.) Judge Collins read the subpoena and was then asked by Agent Cleveland if he had any of these documents and if he had any business dealings with John Ross. Judge Collins said no. (Record 521.)

A person is in custody for *Miranda* "purposes when placed under arrest or when a reasonable person in the suspect's position would have understood the situation to constitute a restraint on freedom of movement of the degree which the law associates with formal arrest." *United States v. Bengivenga*, 845 F.2d 593 (5th Cir. 1988). *Bengivenga* held that the reasonable person must be neutral to the environment and to the purposes of the investigation, *i.e.*, neither guilty of criminal conduct and thus overly apprehensive nor insensitive to the seriousness of the circumstances. *Id.*

Under the circumstances as presented here, the actions of the federal agents as delineated above would indicate ***absolutely*** to a reasonable person in the position of Judge Collins that he was in custody or significantly

restrained in his movements. He was barricaded at the intersection of Magazine and Julia Streets while operating his family automobile along a public thoroughfare during daylight hours. One barricading vehicle collided with an unrelated auto. (Record 521)[9] Two other FBI units pulled behind and alongside Judge Collins' vehicle. Without permission, an FBI agent opened the driver's door of Judge Collins' car and "guided" him out of the car, to be detained until Agent Cleveland arrived. Judge Collins was surrounded by federal agents, including the lead agent, who advised him that the judge was a target of a federal investigation involving bribery for leniency in the sentencing of Gary Young, which investigation included tape recordings and visual surveillance. The judge "voluntarily agreed" to accompany the agents to his chambers and was physically led away to another enforcement vehicle for the drive back to the courthouse and searches there.

The confrontational nature of the seizure of Judge Collins, the confiscation of his automobile (Record 521), and the subsequent detention of Judge Collins during the searches conducted *seriatim* all under the spectre of Judge Collins being a target of an investigation of bribery certainly would lead a reasonable person to believe that he had been taken into custody and/or significantly restrained and about to be taken into custody.

Testimony by Agent Cleveland to the effect that Judge Collins was told that he was not under arrest and

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[9] Conveniently, the government characterized this vehicular contact as "touching" the bumper. (Record 521.)

that he was free to leave is meaningless when taken into account with the actual actions by the FBI agents.

Pursuant to *Bengivenga*, and the other law cited in co-appellant John 'Ross' brief, which is adopted, any statements he made during the automobile ride from the spot of his seizure back to his chambers and/or during chambers should be suppressed.

G) SUPPRESSION OF WIRETAP EVIDENCE

For the reasons and arguments delineated in co-appellant John Ross' brief, which one hereby adopted, Judge Collins believes the trial court erred in failing to suppress the wiretap evidence in this case.

H) FIFTH AMENDMENT VIOLATION DURING PROSECUTORIAL ARGUMENT

In extending the self-incrimination clause of the Fifth Amendment to the States through the Fourteenth Amendment, the Supreme Court held that prosecutorial comment on a defendant's failure to testify violates one of the cornerstones of our criminal justice system.

> For comment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice,' [citation omitted] which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a Constitutional privilege. It cuts down on the privilege by making the assertion costly. . . . What the jury may infer, given no help from the court [or from the prosecutor], is one thing. What it may infer when the court [or the prosecutor] solemnizes the silence

> of the accused into evidence against him is quite another. *Griffin v. California*, 380 U.S. 609, 614, 615, 855 S.Ct. 1229, 1232-1233 (1965).

The record in this case of the prosecutor's comment on Judge Collins' failure to testify at the trial during the rebuttal argument as well as the record established at the Motion for New Trial in this matter clearly shows that the prosecutor made a direct, pointed comment on Judge Collins' failure to take the stand in his own behalf. Thus, Judge Collins' conviction should be reversed.

During his rebuttal argument in closing, the prosecutor made the following comment:

> There was already $16,000.00 in his chambers. He had already started spending it. *And he won't tell anybody what it's for. If it's a real estate deal, tell us.* (Vol. 20, p. 126.) (Emphasis added.)

Further, at the hearing on the Motion for New Trial, the defendant called several persons as witnesses who were spectators in the court at the time the prosecutor made this statement. All three of these witnesses, including a judge retired from both the Fourth Circuit Court of Appeals, State of Louisiana, and Criminal District Court, Parish of Orleans, State of Louisiana, testified that they specifically heard the prosecutor make the foregoing comment and saw the prosecutor raise his hand and point directly at Judge Collins. (Vol. 17, p. 17-23.) Additionally, two of these witnesses indicated that the prosecutor raised his voice at the time that he mentioned Judge Collins' name. (Vol. 17, p. 21-23.) The record of this testimony stands unopposed because the government conducted no cross-examination.

As the Supreme Court and this Honorable Court has recognized, the Fifth Amendment prohibits a prosecutor from commenting directly or indirectly on a defendants failure to testify. *Griffin, supra.; United States v. Bright,* 630 F.2d 804 (5th Cir. 1980); *United States v. Borchardt,* 809 F.2d 1115, 1119 (1987). "Comment on a defendant's silence is reason for reversal only if the speaker's manifest intention is to focus on that silence *or* the remark was such that a juror would naturally and necessarily take it as a comment on the defendant's failure to testify." *United States v. Garcia,* 655 F.2d 59, 64 (5th Cir. 1981). Not only direct but also indirect comments that "undermine the defendant's Fifth Amendment rights will invalidate a conviction." *Id.*

The record is unequivocal that the prosecutor was commenting on Judge Collins' failure to testify at the trial. Besides pointing directly to Judge Collins and raising his voice, the prosecutor spoke in the present tense, not the past, and to the audience then present, the jury, when he stated: "If it's a real estate deal, *tell us.*" Thus, his manifest intention was surely to comment and focus on the decision not to take the witness stand, a decision that Judge Collins made after tremendous agony and introspection. The inescapable conclusion the jury is led to reach is that Judge Collins must *personally* "tell us" about the real estate deal or the jury should reach the conclusion that he is guilty.

The government's own poll shows the prosecutors' intent to focus on Judge Collins' silence as well as the natural effect on the jury that was empaneled. Referring to question B1 of the poll (Record 1379, Exhibit 2), the question reads as follows:

> Now I'm going to read you a series of statements about the legal system. For each one I read to you, please tell me if you agree strongly, agree somewhat, disagree somewhat, disagree strongly or have no opinion.
>
> People accused of a crime ought to have to prove they are innocent.

When the results of this question are reviewed (Record 1379, Exhibit 3), both the intent of the prosecutor and the effect on the jury of the prosecutor's comments become amazingly clear. More than 97 percent of the 457 persons answered this question. Of those answering, or more than one-third "agreed strongly." Another 114 persons "agreed somewhat," with the result that almost two-thirds answering this question thought a defendant had to prove himself innocent. The prosecution thought that these percentages were so significant that the individual percentages were totalled in handwriting and the cumulative percentage of 63.3 percent of the people who agreed that a defendant must prove his own innocence was circled.[10]

The prosecutors certainly intended to plant and nurture in the jury's collective mind the seed that a defendant has to prove himself innocent with the statement by

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[10] Judge Collins asserts that this had to be the prosecutors who made this notation because the government pollster who testified at the Motion for New Trial stated that he did not make the handwritten notation on the results but presumably the government did when the pollster held a telephone conference with the prosecutors to discuss the poll results. (Vol. 17, p. 64-65.)

the prosecutor that Judge Collins must "tell us." Defendants also submit that in light of this poll, the effect on a jury chosen from this district is obvious.

The present case is both similar and dissimilar to *United States v. Martinez*, 894 F.2d 1445 (5th Cir. 1990) See also, *United States v. Sardelli*, 813 F.2d 654 (5th Cir. 1982). As in this case, the prosecutor in *Martinez* improperly and to the "strong disapproval" of the Fifth Circuit commented on the defendant's failure to testify. *Id.* at 1450-1451. The *Martinez* court found that the prosecutor's comments were inappropriate and inflammatory and that the remark could have been construed by the jury as a comment on the defendant's silence at trial. However, the Fifth Circuit found any error was harmless beyond a reasonable doubt because video tapes and audio tapes of the defendant whose rights were violated unequivocally showed discussion of the false making and selling of citizenship documentation. *Id.* at 1447-1448, 1451.

There was no such evidence in the present case. At no time on any of the tape of any discussions between Judge Collins and John Ross was there a specific, unequivocal showing of bribery and/or obstruction of justice in relation to the sentencing of Gary Young. The lack of such unequivocal evidence in this case does not allow for the labeling of the prosecutor's comment as "harmless error."

If anything, the record as a whole – including the testimony of all the witnesses – lent reasonable doubt on the guilt of Judge Collins. There were no audio or video tapes on Judge Collins' accepting a bribe. There was testimonial evidence not only from Mr. Ross but also

from a relative of Judge Collins that the real estate at issue was for sale. Indeed, the fact that only $17,500.00 of the $100,000.00 of the so-called bribe was given to Judge Collins whereas the conversation between Ross and Young on the tapes suggests that Judge Collins was allegedly to get half of the $100,000.00 supports the defense of a real estate transaction. It also casts doubt on the whole issue of bribery as to both defendants. Yet, when faced with all of this evidence, the prosecutor in an attempt to breathe life into the government's case coldly violated the Fifth Amendment.

In view of the closeness of the evidence in this case, there certainly could have been reasonable doubt as to Judge Collins' guilt. Yet, when the prosecutor improperly referred to Judge Collins' failure to testify at trial, the government improperly bolstered its case with a comment that certainly contributed, if not led directly, to the conviction, thus removing the calculated comment from the realm of harmless error.

This Honorable Court framed the harmless error analysis in *United States v. Kane* as follows: "[A]bsent the prosecutor's allusion to the failure of the [defendant to testify, is it] clear beyond a reasonable doubt that the jury would have returned a verdict of guilty?" *United States v. Kane*, 887 F.2d 568, 576 (5th Cir. 1989), quoting *United States v. Hasting*, 461 U.S. 499, 103 S.Ct. at 1981. Judge Collins submits that in this case the answer to that question here is a resounding "NO."

The government has offered different explanations at different times to show the prosecutor was not commenting on Judge Collins' failure to testify at trial. These

arguments are smoke screens at best. The words of the prosecutor, in present tense, coupled with his emphasis through intonation and fingerpointing clearly show that the prosecutor was commenting on Judge Collins' failure to take the stand. There can be no doubt that in the context in which the statement was made, the prosecutor was stung by the strength of the closing argument of defense counsel and envisioned his case dying. Indeed, at the beginning of his rebuttal argument, the prosecutor referred to the passionate, eloquent, emotional argument of Mr. Murray, counsel for Judge Collins, and referred to him by name ten times during the beginning of his rebuttal. (Vol. 20, p. 122-123.) In this context, Judge Collins believes that the prosecutor, having heard both defense counsels' closing arguments and having seen their effect on the jury, knew the government's case was crumbling. Then, desperately, the prosecutor stepped outside the bounds of constitutional law and commented directly on Judge Collins' failure to testify.

The different explanations by the government for the comment, when reviewed carefully, support the argument that the comment was aimed at Judge Collins' failure to take the stand. For example, the prosecutor in response to Judge Collins' Motion for Mistrial following his prejudicial comment stated that he was commenting on Judge Collins' failure to tell anyone "at the scene" of the search in his chambers what the $16,000 was for. (Vol. 20, p. 135.) Yet, the trial testimony of FBI Agent Freddie Cleveland is unequivocal that after Judge Collins asked at the beginning of the search of his chambers for the probable cause for the search and following Agent Cleveland's answer, "at that point he said he thought it was best that he talk

to an attorney and I said, 'fine you are free to call one at any time.' " (Vol. 8, p. 15-16.)

Later during the search, Agent Cleveland asked Judge Collins to open his credenza. At trial, the prosecutor asked Agent Cleveland if Judge Collins said there was money in the credenza from a real estate transaction, and Agent Cleveland responded "No." (Vol. 8, p. 26.) But this "No" has to be understood in context. According to Agent Cleveland, the colloquy continued as follows:

> Q: Did he protest that you were taking his money.
>
> A: No, sir.
>
> Q: *Did he say anything at all?*
>
> A: *No, sir.*
>
> Q: *Did he ever say anything about that money during the search?*
>
> A: *No. sir,* other than when I gave him a receipt for the money I asked him if the receipt accurately described what we were taking and he said, yes, it did and he signed the receipt.

(Vol. 8, p. 26-27.) (Emphasis added.)

The government would have this Court believe that the prosecutor was commenting on Judge Collins' specific refusal to answer specific questions from Agent Cleveland at the time of the search as to the origin of the $16,000.00. As the testimony shows, however, there were no such questions from Agent Cleveland, and Judge Collins stood silent, not protesting any action by the agents during the search after Judge Collins told them he

wanted to speak to an attorney. The evidence belies the government's argument.

However, even if this Honorable Court believes the argument that the prosecutor was commenting on Judge Collins' silence during the search of his credenza, that is an unconstitutional penalty. The government under its argument only can win based upon the faulty legal premise that comment on pre-arrest silence is permissible. It is not. No comment can be made on pre-arrest silence when a defendant does not take the stand to testify in his own behalf. *See Fencl v. Abrahamson,* 628 F.Supp. 1379 (E.D. Wis. 1986), *affirmed* 841 F.2d 760 (7th Cir. 1988). *See also United States v. Karo,* 637 F.2d 869, 876 (2nd Cir. 1981); *United States v. Blanton,* 730 F.2d 1425, 1433-1434 (11th Cir. 1984). *Cf. United States v. Harrold,* 796 F.2d 1275 (10th Cir. 1986).[11]

It is interesting to note the government's scrambling for yet another explanation for the comment in its Opposition to the Defendant's application for bond pending appeal (Record 1343.) There the government argues that the prosecutor's comment was not made in reference to Judge Collins' silence during the search of his chambers but to the "lies that Collins told the FBI" during the automobile ride from the location where Judge Collins was seized back to his office. (Record 1343.) This was the government's second argument when it realized the unconstitutionality of comment on pre-arrest silence. However, Judge Collins submits that this is nothing more

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[11] This issue of comment on pre-arrest silence has not been addressed by this court or the United States Supreme Court. *See Jenkins v. Anderson,* 447 U.S 231, 100 S.Ct. 2124 (1980), note 2.

than another sham argument. The inconsistencies and shifting grounds of the government's arguments belie its own desperation.

Judge Collins made his decision not to testify in view of the testimony of John Ross, who had explained what happened. Under the best-case scenario, with the benefit of having listened to John Ross on the tapes, Judge Collins could only have been embarrassed by taking the stand.[12] However, the Judge naively believed that he was presumed innocent and that the government had the burden of proof; hence, after much soul-searching, he reluctantly decided at the urging of his attorneys that he had no reason to testify in his own behalf. Obviously, he was naive. This is especially true when Judge Collins was denied the knowledge of the poll and its results that almost two-thirds of the potential jurors in this district believed not in the presumption of innocence but, instead, that a defendant was required to prove himself innocent.

This is not the typical case where the evidence of guilt was overwhelming. Indeed as set forth earlier, the factual evidence was very close. It could have, and evidently did, rise or fall upon whether or not Judge Collins' decision not to take the stand would be commented on by the prosecution, tipping the scales toward a guilty verdict. To allow the government to take advantage of Judge Collins' exercise of his Constitutional Right reverts our

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[12] It is apparent with the benefit of hindsight that Judge Collins never should have taken cash from John Ross regardless of how long they had been friends or how legitimate the proposal by Mr. Ross seemed to be at the time that it was presented.

system of justice to an "inquisitorial system of criminal justice." *Murphy v. Waterfront Commission,* 378 U.S. 52, 55, 84 S.Ct. 1594, 1596 (1964).

I) ILLEGAL SENTENCING

The final issue raised by Judge Collins is solely in the alternative. He does not believe that his conviction should stand for the reasons set forth herein. However, Judge Collins must also address the issue of error at sentencing.

There is no doubt that the crime of which Gary Young was convicted was a pre-sentencing guidelines crime. (Vol. 16, p. 134.) Yet, at the sentencing of Judge Collins in this case, the guidelines used were those of accessory-after-the-fact to Gary Young's offense. (Vol. 18.) Judge Collins submits that this was error that should be reviewed *de novo* because it involved a court interpretation of requirements of the guidelines. *U.S. v. Lara-Velasquez,* 919 F.2d 946, 953 (5th Cir. 1990).

U.S.S.G. Section 2C1.1 of the sentencing guidelines, entitled "Offering, Giving, or Soliciting a Bribe; Extortion Under Color of Official Right," states that there should be a base offense level of ten. Subsection (b)(2)(B) of that section also states that if the offense involved a bribe for the purpose of influencing an elected official or any official holding a high-level, decision-making or sensitive position, the base offense level should be increased by eight levels. Section 3C1.1, "Obstructing or Impeding the Administration of Justice," increases the offense level by another two levels if the defendant willfully obstructed or impeded or attempted to obstruct or impede justice.

Thus, Judge Collins believes that his sentencing level should only have been level 20, which comprises a base level of ten, plus the eight-level increase because the offense involved a bribe of a decision-maker/person in a sensitive position, plus the two levels for obstruction of justice.

This offense level of twenty with a criminal history category of I, in which Judge Collins was put, places Judge Collins at a level of 33 to 41 months imprisonment.

Yet, the sentence in this case clearly went beyond the Sentencing Guidelines. The sentence was based on U.S.S.G. Section 2C1.1(c)(l) on the premise that Judge Collins was an accessory- after-the-fact to Gary Young's crime. This subsection states that when the accessory-after-the-fact section is used, the base offense level will be six levels lower than the offense level for the underlying offense Gary Young's underlying offense was then computed according to the sentencing guidelines. This was an offense level of 32. Subtracting the six levels from level 32 pursuant to the accessory-after-the-fact guideline and adding two levels for obstruction of justice, leads to a level of 28, under which Judge Collins was sentenced.

However, this literally was mixing of apples and oranges in that the sentencing guidelines for accessory after the fact was based upon a pre-guideline offense. Gary Young's offense was not committed under the guidelines. Therefore, to transform this pre-guideline offense into a guideline offense for the purpose of sentencing Judge Collins is inconsistent with the theory for departures of sentencing set forth in the guidelines, U.S.S.G., Ch. 1, Pt. A, Section 4.(b). and a denial of Judge

Collins' due process rights. If anything, Judge Collins' sentence should be computed as set forth herein such that he is sentenced under an offense level of 20, 33 to 41 months, as opposed to a offense level of 28, 78 to 97 months.

V. CONCLUSION

There is no question but that Judge Robert Collins did not receive a fair trial. This Court would not let a similar conviction stand against he [sic] most flagrant bank robber or dope dealer. However, thanks in part to the poll conducted by the government, the defense senses that there are dynamics and pressures extant that make this case difference from most. It is with the greatest respect and deference to this Court, and the members of the panel, that we address these concerns. The defense fears not that the Court lacks the wisdom and fortitude to do what is right. Rather, it is hoped that by confronting some of the peripheral issues, the Court can better achieve that elusive goal of equal justice under law.

For example, the defense suggests it has made a very compelling argument that the Executive Branch of government should not be able to investigate the Judicial Branch unless it has reasonable suspicion. The unpopular judge, the minority judge, the judge who sentences less than the executive branch might wish, needs to be protected against the insidious actions demonstrated in this case. There was absolutely no reasonable suspicion of wrongdoing on the part of Judge Collins when the government operative was offering $100,000.00 to a friend of the judge to bribe him. The government would argue that

its actions were vindicated by the search that did in fact turn up money. Without suggesting that the money was for the purpose contended by the government, the defense asks the question, suppose they had found nothing? They would have stopped a federal judge on the street, taken him from his automobile, transported him to his chambers in full view of all of the court personnel and the news media. The damage would have been done. He would have been the federal judge who was "under investigation" by the FBI. All the waters of Neptune would not wash away that stain. Knowing what an attractive target a federal judge can be for certain members of the Executive Branch of government, and the disreputable informants with whom they ally themselves, there ought to be an absolute prohibition against their undertaking any "sting operations" against a member of the judicial branch of government without at least having reasonable suspicion of criminal wrongdoing.

Regardless of the reasonableness of that rule, the defense understands that it would be very difficult for this Court to enact it. No judge wants to be perceived as carving out special rules of protection applicable to the judiciary that are not afforded to all citizens. That is so even though the rule being proposed is designed not to protect judges but the independence of the judiciary, which is all that stands between the enormous power of government and those citizens. For that reason, the argument is compelling.

Likewise it would be unrealistic not to recognize that the present system has built in extra difficulties for appellate judges by denying release to defendants pending

appeal. Once a single member of the court has determined that the issues on appeal are insubstantial, with the result that the defendant is incarcerated, the members of the three-judge panel would be less than human if they did not feel some hesitancy in overruling their brethren and finding that not only were the appellate issues substantial but also they were so much so that a reversal is required. It would be naive not to recognize that the awkwardness of the situation is manifold when the defendant who has been incarcerated is himself a federal judge.

The defense does not make these points to complain about the unfairness of the system or to suggest that the panel would be disposed do anything other than decide the case on its merits. However, this particular defendant, like no other who has ever been before this Court, understands that federal judges are imbued with the same human frailties and tendencies as less men. Yet they can, and for the most part do, transcend those weaknesses when they are confronted directly with the choice between what is right and what is expedient. The defendant respectfully pauses to present that confrontation.

In that regard, the defendant Collins makes one final point. It has been obvious to him since the inception of this matter that his continued presence as a judge is a matter of some embarrassment to the federal judiciary. To an extent that embarrassment is justified, but it has nothing to do with guilt of any criminal violation. In hindsight it is apparent that Judge Collins never should have had any business dealing with John Ross, and certainly not any cash transactions. Judge Collins now has been able to listen to the recorded conversations between John

Ross and the government's informant. While all of the representations by Ross in those tapes are false, Judge Collins recognizes that he lent an air of credibility to them by even discussing the case with Ross. He therefore does not fight to salvage his judgeship; but he does fight to prove his innocence. He has no desire to hang on tenaciously to a position where there may be a serious public perception that he can no longer be effective, but he does fight tenaciously to prove that he is innocent of any criminal wrongdoing. This Court well understands that any resignation by him while criminal charges are pending will be construed by the very persons who will comprise the jury in any new trial as an admission by him that he is in fact guilty of the charges against him.

Judge Collins does not suggest to the Court any type of bargain or promise that, if he is granted a new trial, he will resign. That would be inappropriate. However, it would also be inappropriate for this Court to allow the thought of his continued service as a federal judge to in any way intrude into its deliberations, no matter how subtle that intrusion might be.

Notwithstanding the allegations brought against him by the government, Judge Collins has devoted his life to supporting and defending the constitutional principles which are the foundation of our criminal justice system. He continues to believe in the Constitution and in the system. He simply asks that it be allowed to work. A reversal of this conviction by this Court does not result in

his acquittal, but only in his being retried in an atmosphere free of the errors that infected his first trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served upon the Department of Justice Attorney handling this matter by United States Mail, this 21st day of February, 1992.

/s/ Ralph Capitelli
RALPH CAPITELLI

APPENDIX I

[p. 1] UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

THE UNITED STATES — CRIMINAL DOCKET

VERSUS — NO. 91-35

ROBERT F. COLLINS
JOHN H. ROSS

HEARING HELD ON MAY 16, 1991
BEFORE THE HONORABLE JOSEPH H. YOUNG
UNITED STATES DISTRICT JUDGE (MARYLAND)

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Proceedings recorded by mechanical stenography. Transcript produced by computer aided transcription.

* * *

[p. 183] Okay. Very well. Anything else?

MR. MURRAY: Mr. Reese w

l address one further

matter, your Honor, that may or may not end up being related to the instant motion. But I'd ask that the Court allow Mr. Reese to address that.

MR. REESE: Very succinctly, your Honor, it's come to our attention that a poll is being run in the Eastern District of Louisiana, and I queried Mr. Cole about that last evening. A poll is apparently being run by the government.

THE COURT: A poll?

MR. REESE: A poll, sir. We would certainly like to get the questionnaire. We understand it takes an hour to go through the poll. It specifically refers to the defendants in the case. We would like to know what research body is being utilized. The jury venire in this district are apprehensive about that. Certainly we would like to have the results. Your Honor, certainly I have not encountered this situation in my 13 years of practice of law, and I'm certainly at a loss to understand why this is occurring. And also, your Honor, we would like to reserve the opportunity to amend the motion if there has been some potential taint of the jury process.

MR. COLE: Your Honor, first of all, I have encountered this type of situation, not infrequently. The poll that has been conducted is a random sampling. It is indeed very [p. 184] carefully tailored so that it will not –

THE COURT: Has it already been sent?

MR. COLE: It's not going out in the mail. It's a random telephone survey. It does not take an hour.

THE COURT: It will stop as of right now.

MR. COLE: It will, your Honor.

THE COURT: I'll poll the jury.

MR. COLE: Very well, your Honor.

MR. GARCIA: Your Honor, I'd just like to say for the record, it's our understanding – we've gotten a lot of feedback – and apparently either most of them or all of them –

THE COURT: Anybody who has been called on the venire of the case who has been polled will be excused automatically.

MR. COLE: Your Honor, I would also like to bring to the Court's attention the fact in doing any of this, we specifically instructed, and it was done, that the first question was Have you been called for jury service, and if the person's answer was yes, the poll was not then done. They were not asked any further questions and the conversation was terminated.

THE COURT: I just think it has great potential for danger, and I don't need great potential for danger. You all want to live dangerously, and the defense wants to give dangerously, and the lawyers want to, that's fine. Not me.

[p. 185] MR. COLE: Our view on it, your Honor, is – and we've stated to the Court from the very beginning – starting on the day of the indictment the defendants have been making press statements and allegations of racism.

THE COURT: I know that. That all goes on. I have seen articles on it. There was an article in the American Bar Journal recently I have seen. I'm sure you have all seen that. I'm not happy about it, but we don't live in a perfect world, either as far as the government or

those against whom the government makes charges. All I can do is do my best to make sure we have 12 tried and true people, plus the number of alternates, who have no taint in this case of any kind, and there will be no polling from this moment on of anybody who is a potential juror in this case, because I will at the time of the voir dire, when I ask Has anybody talked to you about this Case, I will specifically add on to that, has anybody talked to you about this case, has anybody called you, discussed it? They say yes, that's the end of that person.

MR. COLE: We would concur in that, your Honor, as well, quite readily. That's the reason we put that first question in. If there was an imperfection in that process, we would have asked the Court to go ahead and ask that question anyway at voir dire. We don't want anybody who has been asked questions on the survey to be on the jury.

THE COURT: Well, then why would you ask them? I [p. 186] don't understand.

MR. COLE: It's to find out exactly how far the inflammatory language the defendants have been putting out in the press has infected the community.

THE COURT: That's my job, not yours, not the defendants' counsel.

MR. COLE: I understand that, your Honor.

THE COURT: I'll conduct the voir dire, I'll find out, and if there are potential people, potential charges of prejudice or something, we'll weed it out. That's the purpose of it. But I'll do it. I don't want anybody else

doing it, and that goes for the government, goes for the defendant.

MR. REESE: Your Honor, if I might, would the Court be so kind as to order the government to produce a copy of the questionnaire that's being used and also whatever sample they have used or how they arrive at that random sample so that we might prepare for that at the time of the voir dire?

THE COURT: Well, how do you prepare for it?

MR. REESE: Your Honor, again, we don't know. We don't know what's been asked.

THE COURT: I don't care. Well, I do care what's been asked. I'm going to ask them Have you been called by anybody relating to this case? If a hand goes up, Thank you, you may report back to the jury room.

MR. REESE: Our biggest apprehension is that names of [p. 187] the defendants have been used.

THE COURT: If that has occurred and that person is excused, how have you been harmed? I'm not happy about it, but, as I say, we don't live in a perfect world.

MR. GARCIA: May I make a comment, please?

THE COURT: Sure.

MR. GARCIA: I understand what you're saying. It certainly wouldn't hurt for witnesses who are excused by your Honor –

THE COURT: Not witnesses, jurors.

MR. GARCIA: – jurors who are excused by your Honor who have been called for the poll, but I think it's only fair, your Honor, if the Court would order the government to give us the results of those. They have tested the waters. They have, as far as I'm concerned, a very unfair advantage. Even if the people who have been called have been excused, it still gives them a cross section of the community, gives them an idea what they have been exposed to, gives them an idea of how they intend to react. I think we should at least be on a level playing field, let us look at that survey and let us have the advantage that they have when we select the jury.

THE COURT: You're liable to adopt it.

MR. GARCIA: Your Honor, I may. I certainly think we should have an opportunity to look at the results on it, your Honor. That gives us an opportunity to know what questions to [p. 188] ask, what questions to suggest, and what the air is about this case in the community.

MR. REESE: We're asking for parity, your Honor.

THE COURT: Pardon?

MR. REESE: Parity.

THE COURT: Parity.

MR. REESE: Parity.

THE COURT: Parity, sure. I'm looking for fairity, F-A-I-R-T-Y. Let me simply say this. I condemn the procedure. Let there be no mistake about that. I think it's an outrageous procedure to follow. I know, I have heard

of cases in which the government and defendants, not in this case, but other cases, have attempted similar procedures. I have attempted wherever it happened to make sure that, if there was any tarnish, it is done away with in the case and I will certainly do that here. So less there can be any possible slipups, how do you have this information now?

MR. COLE: We don't have much information at this point now, your Honor. As I understand it the sampling has all been done, but we don't have very much information. I would just like to say in response to your comment, we were unaware of the court's feeling on this. We are sorry if we offended you. We understand this is done in the Department of Justice, it's done in civil rights cases, not infrequently at all.

THE COURT: Don't call it Department of Justice when [p. 189] you use this way of doing it. That's not justice as far as I'm concerned. Let there be no mistake about that. I think it's an outrageous procedure. I think it does nothing to attempt to get a fair jury by either side. And I'm not saying that Justice is the only ones who have done it. Others have done it. I know that. I don't commend it to anybody, and I will certainly do all I can to make sure that nothing happens on this. But so there can be no mistake, submit to me for in camera review everything that you have and then I will communicate with counsel.

MR. COLE: Very well, your Honor.

MR. REESE: Thank you, your Honor.

THE COURT: What else can we put to rest?

MR. MURRAY: We submit the matter, your Honor, on the motion to dismiss.

THE COURT: Do you want Mr. Yamalos?

MR. CAPITELLI: We wanted to leave the option open on that. I tried to call back. I understand the Court's schedule, but I'd like to be able to respond to Mr. Yamalos once we have a chance to talk to his counsel.

THE COURT: What I suggest you do is talk with his attorney. He's here in New Orleans?

MR. CAPITELLI: Yes.

THE COURT: See if you can make some way to get whatever it is you're looking for.

APPENDIX J – REPLY BRIEF TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

91-3778

In the

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-3778

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

VERSUS

ROBERT F. COLLINS AND JOHN H. ROSS,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

REPLY BRIEF ON BEHALF OF
ROBERT F. COLLINS
(Received May 11, 1992)

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* * *

V. VIOLATION OF BATSON V. KENTUCKY

Again, Judge Collins will not refute each and every government argument because of lack of space and need. However, two points need to be addressed. First, the government argues based upon the district court's opinion that the defendants were given an opportunity to develop the record before the venire was dismissed but elected to wait. This is a twisting of the facts and the actual procedure employed by the trial court. After the jury was chosen and while the jurors were seated in the jury box, the district court asked if the jury was acceptable to the parties. Faced with the prospect of addressing the specific issue in front of the jury or doing so out of the presence of the jury, the defense stated that the jury was acceptable "subject to the matters we discussed with

the court that we can put on the record later." Vol. 9, p. 162-163.) This certainly was not an invitation to the trial court to dismiss the venire a few moments later. The trial court did this on its own accord knowing that the defendants were going to raise a *Batson* objection as the defense had stated a few minutes earlier. (Vol. 9, p. 154.)

This error was compounded when the trial court in light of a valid *Batson* objection dismissed the defense's motion for mistrial based purely on his own notes when the government was asking the court *to leave the record open* so that it could "put our independent reasons on the record for those strikes." (Vol. 9, p. 170-171.) The trial court should have immediately held a *Batson* hearing, recalling the venire and making the government put its independent reasons on the record at that point, not allowing the prosecution a two-day delay before presenting reasons for striking jurors.

The government also attempts to structure the facts to make it appear the defense acquiesced in allowing the government to put its reasons on the record two days later. This could not be farther from the truth. There is nothing in the record to indicate this. The government would have this Court believe that because Judge Collins did not object to the postponement of the government's putting its reasons on the record, that he agreed to this. (Vol. 9, p. 171.) Yet, the record shows that the trial court quickly cut off any further discussion on the *Batson* issue and moved on to other issues, asking "Any other preliminary matters?" (Vol. 9, p. 171.)

Further, the government argues that on the morning of June 19, it requested to state the reasons for its strikes

but counsel for Appellant Collins suggested a further delay. (Government's Brief, p. 47-48, n. 30.) This also is disingenuous. At the moment to which the government is referring, the government stated that it would take 15 minutes to put its matters on the record and the defense stated that it wanted to respond and would need time to do so, but the jury was waiting outside the courtroom. Indeed, the trial court stated "I hate to keep them waiting." (Vol. 23, p. 14.) When the defense indicated to the court that its response might take more than 5 minutes, the trial court obviously made the decision not to have the government put its reasons on the record while the jury was waiting for the trial to begin. (Vol. 23, p. 14.)

In view of the facts, not the government's version of the facts, and in view of the arguments set forth in his original brief, Judge Collins' conviction should be reversed under *Batson v. Kentucky.*

* * *

APPENDIX K – TRANSCRIPT OF PETITIONER'S MOTION FOR MISTRIAL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

THE UNITED STATES — CRIMINAL DOCKET

VERSUS — NO. 91-35

ROBERT F. COLLINS
JOHN H. ROSS

TRANSCRIPT OF GOVERNMENT'S
CLOSING ARGUMENT
HEARD ON JUNE 27, 1991
BEFORE THE HONORABLE JOSEPH H. YOUNG
UNITED STATES DISTRICT JUDGE (MARYLAND)
AND A JURY

APPEARANCES:

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Proceedings recorded by mechanical stenography. Transcript produced by computer aided transcription.

* * *

[p. 14] (Jury not present)

(At the bench)

MR. CAPITELLI: Your Honor, at this time I want to make a motion for a mistrial on behalf of Judge Collins based on the comments of Mr. Cole in his rebuttal argument. He turned to Judge Collins and, referring to the $16,000 in Judge Collins' credenza, said: And he

won't tell anybody what it's for, which is a clear reference, as he pointed to him, to his [p. 15] failure to take the witness stand, and it cannot be remedied by anything but a mistrial.

MR. COLE: I believe I said he didn't tell anybody what it was for. And I was referring to his failure to tell anybody on the scene.

THE COURT: My recollection was his reference to Judge Collins lying is when he was stopped on the 10th, I believe it was, and I don't see any basis for any mistrial on the comments that you have made, but you have your motion. I deny it.

CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Delmer R. Simpson
Delmer R. Simson, CSR
Date

Supreme Court, U.S.
FILED
FEB 5 1993
OFFICE OF THE CLERK

No. 92-964

In the Supreme Court of the United States

OCTOBER TERM, 1992

ROBERT F. COLLINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the government deprived petitioner of due process when it conducted a pretrial survey concerning the criminal justice system and petitioner's upcoming trial, and did not disclose the results of the study to petitioner until after his trial.

2. Whether the district court erred in finding that the government did not discriminate on the basis of race in exercising its peremptory challenges.

3. Whether the prosecutor commented during closing argument on petitioner's failure to testify or his prearrest silence.

4. Whether the district court deprived petitioner of due process by applying provisions of the Sentencing Guidelines that make the sentence for petitioner's bribery offense depend on the seriousness of the underlying offense with respect to which he accepted a bribe.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-70) is reported at 972 F.2d 1385. The opinion of the district court denying petitioner's motion for a new trial (Pet. App. 82-103) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 1992. The petition for a writ of certiorari was filed on December 7, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Louisiana, petitioner was convicted of bribery, in violation of 18 U.S.C. 201(b)(2); obstruction of justice, in violation of 18 U.S.C. 1503; and conspiracy to commit those offenses and to defraud the United States, in violation of 18 U.S.C. 371. He was sentenced to 82 months' imprisonment. The court of appeals affirmed. Pet. App. 1-70.

1. In the summer of 1989, Gary Young became concerned that he would be indicted on charges arising out of his involvement in a 1985 marijuana importation operation. Young's attorney advised Young that if he was indicted the case probably would be assigned to petitioner, the federal district judge who had handled the charges against Young's co-conspirators. A business associate of Young's, John Yemelos, suggested to Young that petitioner's longtime friend John Ross might be able to help Young bribe petitioner. When Young met with Ross on September 14, 1989, Ross assured Young that he could help him. Young subsequently entered into a plea agreement under which he agreed to plead guilty to certain drug-related offenses. The next day, Yemelos called Young to arrange a meeting with Ross. Young told his attorney about the call from Yemelos; Young's attorney in turn contacted federal authorities. Pet. App. 2-3.

Young, Ross, and Yemelos met on September 29.[1] Young and Ross agreed that Young would pay Ross $100,000 to bribe petitioner to sentence Young leniently. Ross confirmed that he could help Young if his case was assigned to petitioner, and he promised Young that he would "try not to get you any jail time." In a phone call on February 1, 1990, Ross told Young that he had met

[1] Before the meeting, FBI agents fitted Young with a hidden recording device. Pet. App. 3.

with petitioner on January 29, 1990, and that "I didn't, didn't discuss anything by name or anything like that, I just told him that, ah . . . you know, there's a situation. And before it comes up we'll have lunch and all that business." Pet. App. 3-5.[2]

On April 5, 1990, a federal grand jury in the Eastern District of Louisiana returned an indictment charging Young with certain drug-related offenses. After the case was assigned to a judge other than petitioner, Young informed Ross that his attorney intended to file a motion to transfer the case to petitioner. Ross confirmed that he had mentioned the "situation" to petitioner, who had told Ross to let him know when the matter would come up. Ross stated that once the transfer motion was filed, "I'm going to see [petitioner] and tell him . . . to ask for the case . . . well what I mean by ask was, not to refuse to accept the case." Ross went on to tell Young that "as soon as you hear that [petitioner] got the case you get on your knees and thank God." Pet. App. 5.

On May 16, Young told Ross that Young's attorney and the prosecutor handling his case had scheduled a telephone conference call with petitioner for the following day, to discuss whether petitioner would accept Young's case. Ross then placed a call to petitioner's chambers and asked petitioner's secretary to let petitioner know that Ross needed to see him. Later that day, Ross told Young that he was "gonna take him to lunch, and . . . work out some arrangements." The next day, Ross had lunch with petitioner in a restaurant at a New Orleans

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[2] On November 30, 1989, the Public Integrity Section of the Justice Department notified Chief Judge Charles Clark of the Fifth Circuit of the allegations against petitioner. Judge Clark assigned Fifth Circuit Judge John M. Duhe to oversee the investigation. Thereafter, Judge Duhe authorized the installation of pen registers and wiretaps on Ross's office and home telephone lines, and on petitioner's private chambers line. Pet. App. 4-5, 7, 9.

hotel. After lunch, Ross called Young and told him that he had spent a two-hour lunch with their "friend" who "gave me his direct number so [that] I can call him . . . later on this afternoon . . . after he's had a discussion with a few people on the telephone." Later that day, Young's lawyer and the prosecutor made the scheduled conference call to petitioner. During the call, petitioner agreed to take Young's case. Ten minutes later, Ross placed a call to petitioner, using petitioner's private chambers line. Immediately thereafter, Ross called Young to tell him that petitioner had accepted his case. Pet. App. 5-6.

In a meeting with Young the following day, Ross described his agreement with petitioner. Ross told Young that "[h]e wants at least 50 percent before . . . you know, 50 now and 50 after he does what he's going to do." Ross explained that "I'm working on a [illegible], see. So that every time you give me, if you give me this, I'm giving him half." Young told Ross that he could have $20,000 by the next week. Ross replied, "Okay. Cause I'm gonna call him and tell him what he can expect." On May 23, Young met with Ross and gave him $20,000 in prerecorded bills. After Young left his office, Ross called petitioner and told him that he needed to see him to "talk about the property," adding, "I have an estimate for you." In a later telephone call, Ross and petitioner agreed to meet again at the hotel restaurant. Ross asked whether he would be able to "deliver those estimates to you," and petitioner answered, "Yeah . . . Yeah, I'm sure." Ross and petitioner met at the restaurant ten minutes later. Ross was carrying a folder, which he placed between them on the table. Neither man touched the folder while they talked for about half an hour. When they got up to leave, petitioner took the folder with him. Pet. App. 6-7.

At a meeting with Young the next day, Ross described his conversation with petitioner. Ross told Young that petitioner wanted him to get letters from people who knew him and would say favorable things about him, in order to "justif[y] [petitioner's] action" in sentencing Young. According to Ross, petitioner had warned Young to act "scared to death" at his plea hearing and to "keep his mouth closed," because a light sentence might look suspicious. Ross added that petitioner did not want anyone to know that "there was any cash involved." Pet. App. 8.

On May 30, Young gave Ross another $30,000 in prerecorded bills. On the same day, Young appeared in court to enter his guilty plea before petitioner. Petitioner set Young's sentencing for August 8. After the plea hearing, Young told Ross that he had thought he was to be sentenced before petitioner went on vacation in July and asked Ross to find out why petitioner had scheduled the sentencing for a later date. Ross called petitioner and told him that he had thought petitioner was going "to try to dispose of that property before going on [his] vacation." Petitioner replied, "No, I don't think I could . . . work it out," adding that he needed to talk to Ross. Ross said that he hoped there were "no problems with the property," and petitioner responded, "No, I don't think so," but then added, "I don't know." Pet. App. 8.

On August 6, Ross called petitioner to tell him that he had an "upper estimate on the balance" in connection with the "act of sale" he had been "trying to get passed" for petitioner. Ross told petitioner that "if my figures are right," the balance was "around ten." Petitioner responded, "Yeah." The two men agreed to meet for lunch the next day to "go over the figures again." Ross told petitioner that he would bring "that information" with him so that petitioner could look at it. Ross met with Young the next morning and told him that he needed to

deliver the remaining funds at lunch that day. When Young reminded Ross that the arrangement had been that the balance would be paid after the sentencing, Ross explained that he "guess[ed] [petitioner] wanted to make sure that he got his money" and asked Young whether he could get "at least 10" immediately. Young returned an hour later with $11,000 in prerecorded bills in a brown folder. Ross then called petitioner and told him that "I just had to wait to get something." The two men met at a local restaurant a short time later. Ross arrived carrying the brown folder; petitioner left with it. Pet. App. 9-10.

Ross called Young later that day and told him that the presentence report had recommended an eight-year sentence and that the recommendation was "cramping [petitioner's] style."[3] Young's presentence report, which was prepared in early August, recommended that he be sentenced to eight years' imprisonment. Ross stated that petitioner could not impose a lighter sentence than the 40-month sentence Young received on a prior conviction without a letter from the United States Attorney's office. That same day, petitioner called the prosecutor who was handling Young's case and asked where Young's "letter of cooperation" was. The prosecutor stated that the government would not submit such a letter because Young had not cooperated. Petitioner pressed the prosecutor on the matter, and the prosecutor repeated that no letter would be forthcoming. Pet. App. 11.

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[3] The presentence report relied in part on Young's prior criminal history, which included a 40-month sentence for a prior conviction. Because the offenses for which petitioner sentenced Young occurred before the effective date of the Sentencing Guidelines, Young was sentenced under the indeterminate sentencing system that prevailed before the Sentencing Guidelines.

On August 8, petitioner sentenced Young to 42 months' imprisonment. Ross called Young later that day to tell him that petitioner had stated that he could not justify giving Young a lower sentence than the sentence he had received for his prior conviction and that if he had "done anything else," he "would've been investigated." The next day, Ross met with Young and told him that petitioner had said, "I did the very best I could without getting myself and you and everybody else in trouble." According to Ross, petitioner had stated that he added two months to Young's previous sentence "to make it seem like I'm doing a legitimate thing." Young told Ross that his lawyer had mentioned filing a motion under Fed. R. Crim. P. 35 to reduce his sentence. Ross responded that he would check with petitioner, adding that "I believe I can get him to say yeah, I'll do a [Rule 35], just give me the justification." Ross then reminded Young that he still owed $31,500 of the $100,000 he had agreed to pay. Young gave Ross $31,500 in prerecorded bills on the next day (August 10). Ross promptly called petitioner and went to his chambers, where petitioner gave Ross specific instructions as to how Young should seek a reduction of his sentence. Pet. App. 11-13.

That afternoon, FBI agents executed search warrants for petitioner's person, his car, and his office in his chambers. The agents stopped petitioner as he was driving away from the courthouse and (at petitioner's request) returned with petitioner to his chambers to conduct the search. On the way to the courthouse, petitioner asked the agents for an explanation of the search. When they answered that there were allegations that petitioner had taken money from Ross in connection with Young's sentencing, petitioner stated that he had accepted no money from Ross for any reason and that he had not been involved in any business dealings with Ross. After they arrived at petitioner's chambers, the

agents served petitioner with a subpoena directing him to produce documents concerning any financial dealings with Ross. Petitioner stated that he had no records of financial dealings with Ross because he had not been involved in any such dealings. When the agents searched petitioner's chambers, they found $16,000 in cash: $6,000 from the payment Young had made to Ross on May 23, and $10,000 from the payment Young had made on August 7. Pet. App. 15.[4]

2. a. Before petitioner's trial, the government commissioned a telephone survey of 457 persons in the Eastern District of Louisiana, asking them questions relating to the criminal justice system and the upcoming trial. Before the government compiled and analyzed the data, defense counsel learned of the survey and reported it to the district court, which ordered the government not to engage in any further polling and to submit to the court the survey and all information generated to that point by the poll. Pet. App. 25-29, 224-229. After reviewing the survey and the results, the court found "nothing that could possibly harm the integrity of the jury that will be selected." *Id.* at 73. The court refused to turn over the polling material to the defendants before trial; it later explained its view that turning over the materials at that time "would raise issues that would unnecessarily complicate the proceedings." *Id.* at 85. The court explained that it was "concerned that if any details of the survey were publicized * * *, jury selection would be difficult because misunderstandings based on the results of the poll could taint the entire panel." *Id.* at 93. During voir dire at petitioner's trial, the court asked whether

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[4] The agents also found $180 of the May 23 payment in petitioner's wallet; the agents recovered the bulk (more than $60,000) of the payments from Ross's office and a safety deposit box under Ross's control. See Gov't C.A. Br. 21-22.

any of the prospective jurors had been polled about the case; no member of the venire had been contacted by the pollsters. *Id.* at 27 & n.20, 86-87 n.1.

b. After voir dire, the district court informed the prosecutor and defense counsel that each side should exercise its peremptory challenges all at once and not in view of the other side. Petitioner's counsel objected to this procedure, stating that "when each side is required to exercise their challenges al[l] together without the other side seeing them and without the challenges being able to be evaluated vis-a-vis what the other ones are doing, we think [it] destroys part of our ability to make any meaningful *Batson* challenges." The court overruled the objection, and each side exercised its peremptory challenges. After the jury was selected, the court asked each attorney whether the jury was acceptable. Petitioner's counsel answered that it was, "[s]ubject to the matters we discussed with the Court that we can put in the record later." The district court then dismissed the venire. Pet. App. 32-33, 96-97.

After the venire was dismissed, petitioner's counsel moved for a mistrial, claiming that the government's use of six of its eight peremptory challenges to strike black jurors violated *Batson* v. *Kentucky*, 476 U.S. 79 (1986). The district court held that petitioner had failed to establish a prima facie case of discrimination under *Batson* and denied the motion.[5] The court did, however, grant the government permission to supplement the record at a later time with an explanation of its peremptory strikes. Two days later, the court held a hearing at which the government set forth the reasons for its peremptory challenges. After hearing the government's explana-

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[5] The jury seated for petitioner's trial was approximately 25% black, which roughly equaled the percentage of blacks in the district. Pet. App. 33 n.28.

tions and petitioner's response, the district court found that the government's justifications were race-neutral and not pretextual. Pet. App. 35-37, 93-94, 97-98.

c. Petitioner and Ross were tried together. At trial, Ross testified that he had received money from Young to start a business and that he had given petitioner the cash found in petitioner's chambers and in his wallet as a down payment on a piece of property that was to be used by the business. Petitioner did not testify. Pet. App. 17-18. To rebut the claim that Ross made the payments to petitioner in connection with a legitimate real estate transaction, the government introduced testimony that petitioner had told the FBI agents on August 10, 1990, that he had received no money from Ross and had been involved in no financial dealings with him. *Id.* at 47-49, 102. In his closing argument, the prosecutor stated:

> There was already $16,000 in his chambers. He had already started spending it. And he won't tell anybody what it's for. If it's a real estate deal, tell us. He is a federal judge for 13 years. He signed search warrants himself for years. He's presided over these trials for years. Are you going to tell me that he isn't capable *at that moment*, if there is a reasonable, innocent, legitimate explanation, from saying ["]Let me tell you what it's all about?["] He knows how the system works. He knows that you can explain. But, no, [petitioner's attorney] wants to create out of whole cloth in his own mind what happened.

Id. at 51. Petitioner moved for a mistrial, claiming that the prosecutor's statement was an improper comment on petitioner's failure to testify. *Id.* at 236-237. The district court denied the motion. *Id.* at 237. The court stated that it viewed the prosecutor's comments as a "reference to [petitioner's] lying * * * when he was

stopped on [August] 10th," and that it "d[id]n't see any basis for any mistrial on the comments." *Ibid.*

d. Sentencing Guidelines § 2C1.1(c)(2) provides that the sentence for a bribery offense committed "for the purpose of * * * obstructing justice" in respect to "another criminal offense" should be determined by "apply[ing] [Sentencing Guidelines] § 2X3.1 (Accessory After the Fact) * * * in respect to that other [criminal] offense if the resulting offense level is greater than that determined [by using §§ 2C1.1(a) and (b)]." Section 2X3.1, in turn, sets a base offense level "6 levels lower than the offense level for the underlying offense." The district court determined that the underlying offense in this case—Young's conviction for importing more than 2,500 pounds of marijuana—would carry a base offense level of 32 under the Guidelines. Because that offense level was greater than the level produced by using Guidelines §§ 2C1.1(a) and (b),[6] the district court set petitioner's base offense level at 26.[7] The court rejected petitioner's claim that the cross-reference provision of Section 2C1.1(c)(2) did not apply because Young's offense occurred before the effective date of the Guidelines, finding that "there is clearly nothing to indicate that the

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[6] Sentencing Guidelines § 2C1.1(a) establishes a base offense level of 10 for bribery offenses, and Section 2C1.1(b)(2)(B) authorizes an eight-level increase for offenses involving payments for the purpose of "influencing * * * any official holding a high level decision-making or sensitive position." Accordingly, petitioner's offense level under those provisions would have been 18. See Pet. App. 64-65.

[7] The court increased petitioner's offense level by two levels pursuant to Sentencing Guidelines § 3B1.3, which authorizes a two-level enhancement if "the defendant abused a position of public . . . trust . . . in a manner that significantly facilitated the commission or concealment of the offense." See Pet. App. 65 n.60.

cross-reference portion of the Sentencing Guidelines is limited to any post-1987 act." Pet. App. 127-128.

3. After his conviction, petitioner moved for a new trial. He claimed, among other things, that the government's pretrial polling denied him a fair trial, that the district court erred in denying his *Batson* claim, and that the prosecutor's comments to the jury were inappropriate. The district court denied the motion. Pet. App. 82-103.

a. On the polling claim, the court concluded that "[a]ny possibility that the jury would be tainted was eliminated by questions posed by the Court during voir dire." Pet. App. 86. The court credited the government's testimony that the responses to survey questions requesting background and demographic information on the persons polled were never compiled or provided to the government, and characterized the information produced in response to those questions before the government ceased the survey process as "an unintelligible series of numbers and symbols." *Id.* at 88 n.2. Concluding that the information the government had "was useless without the missing background and demographic data," *id.* at 88, the court rejected petitioner's argument that the government gained an advantage by using the survey to develop a "juror profile" for use in jury selection and at trial. The court summarized its conclusions by explaining that there was "no evidence that the Government manufactured or 'tailored' evidence" based on those results. *Ibid.* Finally, the district court rejected petitioner's contention that he was entitled to pretrial disclosure of the survey results under *Brady* v. *Maryland*, 373 U.S. 83 (1963), based on its view that petitioner had not suffered any significant prejudice as a result of the court's decision not to disclose the results before trial. Pet. App. 88-93.

b. With respect to petitioner's *Batson* claim, the court noted that petitioner had been "given ample opportunity to develop a * * * record of discrimination" before the venire was dismissed, but had "elected to wait." Pet. App. 96-97. Accordingly, the court reaffirmed its denial of petitioner's *Batson* claim. *Id.* at 99.

c. Finally, the court rejected petitioner's claim that the prosecutor's closing argument included an improper comment on petitioner's failure to testify at trial. Pet. App. 101-102. The district court concluded that the challenged portion of the argument did not refer to petitioner's decision not to testify, but to his failure on August 10 to provide the innocent explanation he offered at trial. The court stated: "Taken in context, * * * the remarks in question refer to [petitioner's] failure to provide the innocent explanation that he presented at trial (a real estate transaction) for the $16,000 cash found in his office, on August 10, 1990, when it would have been natural to do so." *Id.* at 102.

4. The court of appeals affirmed. Pet. App. 1-70.

a. The court rejected petitioner's contention that the government deprived him of due process by conducting the pretrial survey. Pet. App. 25-31. The court of appeals agreed with the district court that the poll was a "red herring" that did not deprive petitioner of a fair trial. *Id.* at 27. In particular, the court found that the government was not able to make use of the survey results during jury selection, and that the district court's voir dire was adequate to ferret out any bias among the prospective jurors. *Id.* at 28-30. The court also concluded that although petitioner "might have found the [poll] results beneficial in trial preparation," *id.* at 31, the district court's refusal to disclose the results did not "significantly handicap[]" petitioner in preparing for

trial or conducting his defense, *ibid.* Accordingly, the court of appeals found no due process violation.[8]

b. Petitioner also renewed his challenge to the procedures followed by the district court with respect to his *Batson* claim, arguing that the trial court acted improperly in dismissing the venire before petitioner had an opportunity to create a record to support his claim. The court of appeals rejected that claim. Pet. App. 32-38. The court of appeals explained that petitioner's failure to object or to ask the court to retain the venire before it was dismissed "waived [his] right to create a record while the venire was present." *Id.* at 35. Moreover, even if the district court had dismissed the venire prematurely, the court of appeals found it "difficult to see how additional questioning would have aided" petitioner in establishing a *Batson* violation.[9] *Id.* at 35 n.30.

The court of appeals also rejected petitioner's claim that the district court erred in permitting the government to state its justifications for its peremptory challenges two days after the jury was impaneled. The court noted that petitioner had not objected when the district court agreed to permit the government to place its justifications for the peremptory challenges on the record, "presumably at some future date." For that reason, the court concluded, petitioner "cannot now complain when [he] failed to object contemporaneously." Pet. App. 36.

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[8] The court of appeals also rejected petitioner's related claim that he was entitled to disclosure of the poll results under *Brady* v. *Maryland*, 373 U.S. 83 (1963). The court reasoned that the results were "not evidence," and that the government therefore had no obligation to disclose them. Pet. App. 31 n.27.

[9] The court observed that "[i]n determining whether the government discriminated against black potential jurors, the focus is on the responses the stricken jurors actually gave during voir dire, not on responses they might have given had they been asked additional questions." Pet. App. 35 n.30.

Petitioner also attacked the district court's finding that the government's explanations for its peremptory challenges were race-neutral and not pretextual. The court of appeals rejected that claim as well, finding "no error" in the district court's determination that the government's justifications were adequate under *Batson*. Pet. App. 37-38.

c. The court of appeals also rejected petitioner's claim that the prosecutor's statement during closing argument that petitioner "won't tell anybody what it's for"—referring to the $16,000 found in petitioner's chambers—was an improper comment on petitioner's failure to testify or on his prearrest silence. Pet. App. 46-55. The court of appeals agreed with the district court that "the prosecutor's comment was not improper when taken in context." *Id.* at 47. Reviewing both parties' closing arguments in detail (*id.* at 48-51), the court observed that the prosecutor repeatedly had referred to the inconsistency between petitioner's defense at trial—that the funds were a payment from Ross in connection with a real estate transaction—and his statements to the FBI agents on August 10, 1990—in which he denied that he had been involved in any financial dealings with Ross or received any payments from him. *Id.* at 47-49.

The court also noted that the challenged statements were made by the prosecutor in an attempt to rebut the argument of petitioner's attorney. Petitioner's attorney had argued that petitioner's statements to the FBI agents were understandable as the reaction of an experienced judge who knew that the agents were "not there for explanation," but were attempting to "solidify [the] case." Pet. App. 50-51. The court of appeals noted that the prosecutor referred to the explanation petitioner gave "at that moment," *i.e.*, at the time he spoke to the agent. The court of appeals therefore concluded that the prosecutor "was referring to [petitioner's] denial 'at that

moment' (August 10) that he had had any business dealings with Ross." *Id.* at 51. The prosecutor's argument thus did not constitute an impermissible comment on petitioner's failure to take the stand. *Id.* at 52. In the alternative, the court of appeals concluded that any impropriety in the prosecutor's remarks was harmless; the court explained that "[e]ven if the prosecutor did comment on [petitioner's] failure to testify, it is plain beyond a reasonable doubt that, given the weight of the evidence, the jury would have returned a guilty verdict absent the remark." *Id.* at 52 n.47.

Petitioner also argued that if the prosecutor's statements were understood as a reference to the events surrounding petitioner's arrest, the remarks were an impermissible comment on petitioner's prearrest silence. In rejecting that argument (Pet. App. 52-55), the court of appeals noted that there was disagreement in the courts of appeals on the propriety of a prosecutor's commenting on a non-testifying defendant's prearrest silence. *Id.* at 52-53. The court concluded, however, that it "need not reach this question," because it found that "the prosecutor's comments were directed primarily toward [petitioner's] affirmative statements—his denial of any business dealings with Ross—as distinguished from his silence." *Id.* at 53. Because "the prosecutor commented on [petitioner's] pre-arrest statements, not his silence," the court rejected petitioner's claim that the prosecutor's statements were improper. *Id.* at 54-55. Also, as with the related claim, the court concluded that "even if the prosecutor's comments were improper, any error would be harmless." *Id.* at 55 n.52.

d. Finally, the court rejected petitioner's claim that the district court erred in sentencing him under Guidelines § 2C1.1(c)(1), because the underlying offense on which the sentence was based—Young's conviction for importing marijuana—was a pre-Guidelines offense. Pet.

App. 66-67. The court of appeals observed that petitioner had "offered no other way in which a court could take into account the seriousness of the underlying offense." *Id.* at 67. The court also found "no inequity" in the fact that petitioner received a more severe sentence than Young, explaining that "Young committed a pre-[G]uidelines offense; [petitioner] did not." *Ibid.*

ARGUMENT

1. Petitioner first contends (Pet. 10-16) that the pretrial polling by the government and the failure to disclose the poll results before trial deprived him of due process. He argues first (Pet. 12) that government polling of prospective jurors "in and of itself is a denial of due process." This Court has made clear, however, that "the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Smith* v. *Phillips*, 455 U.S. 209, 219 (1982); see *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963) (aim of due process "is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused"). Thus, "[e]ven in cases of egregious prosecutorial misconduct," the Court has approved reversal of a conviction only when the misconduct was "material to the case." *Phillips*, 455 U.S. at 220 n.10.

Petitioner was not prejudiced by the government's pretrial polling. Although he asserts (Pet. 11) that knowledge of the poll results gave the government "a head start in knowing the attitudes of persons who would sit as jurors in this matter," the district court found that no member of the jury venire was contacted by the pollsters. Pet. App. 86-87. Moreover, because the responses to survey questions requesting demographic information about the persons polled were never compiled or provided to the government, the prosecutor was

unable to use the survey results to select jurors who held certain attitudes. See *id.* at 87-88. Nor is there any support for petitioner's claim (Pet. 14) that the poll enabled the government to "form and fashion its evidence to fit the mind-sets of jurors."[10] To the contrary, the district court found "no evidence that the [g]overnment manufactured or 'tailored' evidence" based on the poll results. See Pet. App. 88. In sum, even if the pretrial polling was objectionable, the members of the jury were not affected by the polling and the government made no use of the poll results before or during petitioner's trial. Hence, due process does not require that petitioner's conviction be reversed on that ground.

Petitioner also contends (Pet. 11-12, 15-16) that the "principles" of *Brady* v. *Maryland* required the government to disclose the poll results to petitioner before trial. In *Brady*, this Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. The Court later explained that "implicit in [*Brady's*] requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial." *United States* v. *Agurs*, 427 U.S. 97, 104 (1976). Thus, "[t]he proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt," *id.* at 112, and a due process violation will have occurred only when the omitted evidence, evaluated in light

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[10] The only example petitioner cites (Pet. 14) of the government's alleged use of the poll results in devising its trial strategy is "the prosecutor's improper comment during closing argument on [petitioner's] failure to testify." Both the district court and the court of appeals, however, specifically found that the prosecutor did not comment on petitioner's failure to testify. See Pet. App. 52, 102.

of the entire record, "creates a reasonable doubt that did not otherwise exist." *Ibid.*; see *United States* v. *Bagley*, 473 U.S. 667, 682 (1985) (nondisclosure of impeachment evidence requires reversal of a conviction "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different").

Petitioner claims (Pet. 13-16) that he was disadvantaged by his ignorance of the poll's finding that a substantial percentage of those polled believed that a criminal defendant should be required to prove his innocence. See Pet. App. 25, 27-28 n.21. He asserts (Pet. 13) that he would have altered his trial strategy if he had known that the jurors "believed that a defendant had to prove himself innocent." But even if the poll results could be viewed as indicative of the pretrial beliefs of the persons who actually served on petitioner's jury, the district court instructed the prospective jurors that the government had the burden of proof to establish guilt beyond a reasonable doubt.[11] See Pet. App. 28-29. Thus, the district court's instructions were adequate to dispel any confusion the jurors might have had before trial concerning the burden of proof. See *Richardson* v. *Marsh*, 481 U.S. 200, 206 (1987) (noting "the almost invariable assumption of the law that jurors follow their instructions"). Because the poll results could not have "affected the outcome of the trial," *Agurs*, 427 U.S. at 104, the *Brady* rule did not obligate the court to disclose those results to petitioner before trial.

2. Petitioner also contends (Pet. 16-23) that the government's use of its peremptory challenges to strike

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[11] The district court also inquired during voir dire about the jurors' ability to render a verdict based solely on the evidence presented at trial and the law as stated by the court. See Pet. App. 28-29 & n.22.

black prospective jurors violated *Batson* v. *Kentucky*, 476 U.S. 79 (1986). Petitioner first asserts (Pet. 17-19) that the district court did not permit him to object to the government's exercise of its peremptory strikes until "after the venire was dismissed and the jury was sworn," and so prevented him from developing a record to support his claim of discrimination.[12] The record does not support that assertion. After the jury was selected but before the venire was dismissed, the district court asked each attorney whether the jury was acceptable. See Pet. App. 33, 96-97. If petitioner had wanted to raise his *Batson* claim before the venire was dismissed, he could have done so at that time. Thus, petitioner is incorrect in claiming that he had no opportunity to object to the government's use of its peremptory challenges before the venire was dismissed.

Petitioner also contends (Pet. 19) that the district court erred in allowing the government to state its justifications for the peremptory challenges two days after the jury was selected. He suggests no reason, however, to conclude that the brief delay affected the district court's ability to evaluate the credibility of the prosecutor's explanations. See *United States* v. *Romero-Reyna*, 889 F.2d 559, 562 n.6 (5th Cir. 1989) (possibility that a subsequent hearing might allow prosecutor to fabricate reasons for strikes that did not exist at the time of jury selection is merely "fit grist for the trial judge's mill as he assesses the prosecutor's credibility"), cert. denied, 494 U.S. 1084 (1990); see also *United States* v. *Chalan*, 812 F.2d 1302, 1314 (10th Cir. 1987) (allowing government to offer explanations for peremptory strikes on remand after appeal), cert. denied, 488 U.S. 983 (1988); *United*

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[12] As the court of appeals pointed out (Pet. App. 35 n.30), it is not clear how further examination of the venire would have advanced petitioner's *Batson* claim.

States v. *David*, 803 F.2d 1567, 1571 (11th Cir. 1986) (same).

There also is no basis for disturbing the district court's refusal to find a *Batson* violation after hearing the prosecutor's explanations. In *Hernandez* v. *New York*, 111 S. Ct. 1859 (1991), this Court confirmed that the trial court's acceptance of the prosecutor's reasons is subject to deferential review and may not be set aside unless it is clearly erroneous. 111 S. Ct. at 1868 (plurality opinion of Kennedy, J.) ("the trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal"); *id.* at 1873 (O'Connor, J., concurring) (agreeing that Court should "review for clear error the trial court's finding as to discriminatory intent"). The determination that the prosecutor's reasons are not discriminatory rests on a finding of credibility, an issue as to which "[t]here will seldom be much evidence," and "the best evidence often will be the demeanor of the attorney who exercises the challenge." *Id.* at 1869 (plurality opinion of Kennedy, J.). Accordingly, appellate courts rarely are in a position to second-guess the trial court's conclusion that the prosecutor's motive in challenging members of the venire was not invidious.

In this case, the prosecutor's explanations for the peremptory strikes were clear, specific, and race-neutral, as *Batson* requires, see 476 U.S. at 98 & n.20, and the district court did not clearly err in accepting them. *Batson* requires only that a strike not be based on race; "the reason offered by the prosecutor for a peremptory strike need not rise to the level of a challenge for cause." *Hernandez*, 111 S. Ct. at 1868 (plurality opinion of Kennedy, J.). That standard was satisfied here. First, the court of appeals correctly rejected petitioner's claim that the government engaged in purposeful discrimination when it struck a black juror who was a teacher's

aide who provided speech therapy to disabled children, but did not strike a white juror who was a teacher at a technical school. As the court of appeals observed, the government's explanation that a juror who helped disabled children might be more sympathetic to criminal defendants than someone who worked in a technical school was "reasonable." Pet. App. 37 n.32; see *United States* v. *Briscoe*, 896 F.2d 1476, 1487-1488 (7th Cir. 1990) (upholding strike of prospective juror who was a youth supervisor at a juvenile penal center); *United States* v. *Wilson*, 867 F.2d 486, 487-488 (8th Cir.) (social worker with juveniles), cert. denied, 493 U.S. 827 (1989).[13] Similarly, the court properly rejected petitioner's claim that the government's explanation that it struck a black prospective juror because he was employed by a company that was being investigated by federal authorities was pretextual. Contrary to petitioner's suggestion (Pet. 21-22), federal prosecutors were involved in an ongoing investigation of the company at the time of the trial in this case.[14]

3. Petitioner also contends (Pet. 23-27) that the prosecutor commented during closing argument on his failure to testify, or, in the alternative, that the prosecutor commented on his prearrest silence. The court of appeals correctly rejected that contention.

In *Griffin* v. *California*, 380 U.S. 609 (1965), the Court held that a prosecutor's comments on a defendant's failure to testify at trial violated the defendant's Fifth

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[13] Petitioner also claims (Pet. 20) that the government's explanation that it struck a black prospective juror because he was sleeping was pretextual because "the trial court even noted that it never saw the stricken juror sleeping." The trial court accepted the prosecutor's explanation, however, and there is no reason for this Court to second-guess that credibility determination.

[14] The government also struck a white prospective juror who was an employee of the same company. See Gov't C.A. Br. 51 n.33.

Amendment privilege against compelled self-incrimination. Whether a prosecutor's remarks are proscribed by *Griffin* depends on the context in which the remarks are made. *United States* v. *Robinson*, 485 U.S. 25, 33 (1988). The court of appeals found that a central theme of the prosecutor's closing argument was the inconsistency between petitioner's pretrial statements to federal agents and the defense petitioner presented at trial. After petitioner's counsel sought to explain the inconsistency by arguing that petitioner knew that the agents were "not there for explanation," the prosecutor responded by pointing out that petitioner could have offered a legitimate explanation "at that moment." See Pet. App. 50-51. In context, it is clear that the prosecutor's remarks were directed at the plausibility of petitioner's defense, not at his failure to testify.[15]

Petitioner also renews his claim (Pet. 26-27) that the prosecutor's statements constituted an improper comment on his prearrest silence. He asserts (Pet. 27) that there is a conflict in the circuits on the question of the constitutionality of a prosecutor's comment on the prearrest silence of a non-testifying defendant. This case, however, does not present that issue. The court of appeals expressly declined to reach that question, as it found that the prosecutor's comments referred to petitioner's prearrest statements, not to his silence. Peti-

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[15] Petitioner asserts (Pet. 23-24) that the prosecutor's use of the present tense in his closing argument, as well as his "pointing directly" at petitioner and "raising his voice," indicated that his remarks were intended to refer to petitioner's failure to testify. But, as the court of appeals observed, the prosecutor "used the present tense throughout his closing argument," Pet. App. 50 n.45, and his pointing and raised voice "reasonably would have been viewed by the jury as the prosecutor's attempt to add emphasis to his argument relating to [petitioner's] August 10 denials." Pet. App. 52 n.46.

tioner suggests no persuasive reason for this Court to disturb that determination.[16] Accordingly, there is no reason for the Court to consider in this case whether a prosecutor may comment on the prearrest silence of a non-testifying defendant.[17]

4. Finally, petitioner contends (Pet. 28-30) that the district court deprived him of due process by basing his sentence in part on the seriousness of Young's pre-Guidelines offense. That claim is without merit. Sentencing Guidelines § 2C1.1(c)(2) applies to all bribery offenses committed "for the purpose of * * * obstructing justice" in respect to "another criminal offense." Section 2C1.1(c)(2) directs the court to determine the sentence for such offenses by applying Guidelines § 2X3.1, which in turn sets the offense level on the basis of the "offense level for the underlying offense." Neither provision indicates that the sentence may be based only on an "underlying offense" that is subject to sentencing under the Guidelines. Cf. *United States* v. *Willis*, 925 F.2d 359, 361-362 (10th Cir. 1991) (in determining defendant's sentence for illegal possession of firearm, provision of Guidelines that directed court to calculate sentence on the basis of "other offense" committed with firearm applied to state as well as federal offenses);

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[16] Petitioner asserts (Pet. 25-26) that the prosecutor's remarks referred to petitioner's silence during the search of his chambers when, he claims, he "refused to say anything." In fact, petitioner denied having any financial dealings with Ross while the FBI agents were transporting him to the courthouse on August 10, and he repeated those denials after they arrived at his chambers. See Pet. App. 14-15.

[17] In any event, as the court of appeals found (Pet. App. 52 n.47, 55 n.52), any impropriety in the prosecutor's remarks was harmless in light of the overwhelming evidence against petitioner. Compare *Darden* v. *Wainwright*, 477 U.S. 168, 181-183 (1986).

United States v. *Smith*, 910 F.2d 326, 329-330 (6th Cir. 1990) (same).

It does not violate due process to judge the seriousness of petitioner's bribery offense by considering the seriousness of the crime for which petitioner was prepared to reduce the sentence. Petitioner offers no substantial basis for concluding that this admittedly "unique issue of sentencing" (Pet. 28) warrants further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 92-964

In The

Supreme Court of the United States

October Term, 1992

ROBERT F. COLLINS,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF TO GOVERNMENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF OF PETITIONER

ARGUMENT

Petitioner Robert F. Collins files this reply brief pursuant to Rule 15.6 of the Supreme Court Rules to address arguments raised by the United States in its brief in opposition.

Before addressing the arguments individually, Petitioner brings to this Court's attention the fact that the government uses almost one-half of its brief to quote the court of appeals' version of the facts in this matter. As noted in the Statement of Facts in his petition, this version of the facts was unbalanced and failed to present a fair view of the evidence. Without understanding the facts as set forth in his Petition, this Court cannot understand the significance of the constitutional issues Petitioner has raised.

Likewise, the remainder of the government's brief almost parrots the court of appeals' opinion, glossing over or completely missing the important points raised by Petitioner.

For example, the government asserts that before it could compile and analyze the data in its telephone poll, defense counsel learned about it; then, the district court immediately ordered the polling stopped. (Opp. 8.) This assertion completely ignores the analysis by the government, shown in its circling of answers to certain questions in the poll, including the circling of the 63.3% of those answering who thought a defendant had to prove himself innocent and the 89.6% of those answering who thought Petitioner was guilty. (Pet. 13, n.3.) This government analysis was confirmed by the pollster himself during his

testimony at Petitioner's Motion for New Trial. (Pet. 13, n.3.)

Further, for the government to quote the district court's characterization of the poll and its results as "an unintelligible series of numbers and symbols," (Opp. 12.) in the face of the specific poll results (Appendix F) that show the prejudice against Petitioner *and* total disregard *or* ignorance of constitutional principles is a mockery.

The government also misses the point when it argues that there was no constitutional violation because the district court found no member of the jury venire had been polled or because the specific demographic information of the poll was not given to the government. (Opp. 17.) The point *is* that the prosecution was able, using its vast financial resources, to pre-try its case to individuals who would resemble the ultimate jurors, learning their biases and prejudices and lack of knowledge of the Constitution. The fact that the government was given exclusive use of this poll by the district court, which prohibited the defense from conducting its own poll, compounded the error. This is a denial of due process.

Indeed, by pre-trying its case, the government learned that based upon its version of the facts 89.6% of those polled thought Judge Collins was guilty before trial. A recent national poll states that 28% of jurors in general believe a defendant is guilty or probably guilty, an astounding figure in and of itself. "Many Jurors Consider Deep Pockets and Ignore Presumption of Innocence," The National L.J., Feb. 22, 1993, at S12. For the government on one hand to learn that almost 90% of potential jurors thought Judge Collins was guilty after

hearing the government's version of the facts but on the other hand to argue the poll was of no use or value is ridiculous and mocks the principles of due process and fair trial.

In regard to Petitioner's claim of error under *Batson v. Kentucky*, 476 U.S. 79 (1986), the government again blindly follows the court of appeals in arguing that Petitioner had an opportunity to raise his *Batson* arguments before the venire was dismissed but failed to do so. (Opp. 20.) Petitioner notes that it was the district court, not petitioner, which chose to dismiss the venire even though the trial judge knew Petitioner was raising *Batson* challenges. (Pet. 17, n.5.) The trial court erred further when he allowed the prosecution a two-day delay before presenting its reasons for striking jurors, with the result that the venire was long gone by then. Therefore, the government's reasons could not be tested through examination of the venire.

The government also makes the same baseless assertion in its opposition as it did at trial in regard to the peremptory challenge of one juror: he was challenged because of an ongoing investigation of his company. (Opp. 22.) The government conveniently neglects to mention that the potential juror was a newly hired, hourly worker who even had listed his occupation as "unemployed" on the jury questionnaire. (Pet. 21.) Even so, prosecutions at this company ended years ago, and a new worker on the lower rungs of the employment ladder hardly would know about or be influenced by such investigation, even if there were one.

In regard to Petitioner's claim of prosecutorial misconduct during the government's rebuttal argument, the government claims that the comment at issue, when taken into context, was directed at the Petitioner's defense, not his failure to testify. (Opp. 23.) This argument overlooks the prosecutor's specific explanation as to what he meant. Specifically, the prosecutor stated to the trial court in reply to Petitioner's Motion for Mistrial that he was commenting on the Petitioner's failure to tell anyone what the $16,000.00 was for on the "scene." (Pet. 25.) In context, the "scene" can only mean the Petitioner's chambers when and where the money was found. The district court's interpretation of the comment as referring to all the events on August 10, including Petitioner's automobile ride with FBI agents, is belied by the prosecutor's explanation.

Finally, Petitioner argues that the government's interpretation of the United States Sentencing Guidelines reads into the guidelines a meaning that has no basis. To rely on a pre-guideline offense of Gary Young, a separate defendant in a separate case, as the underlying offense for sentencing Judge Collins is a legal contradiction under the Guidelines.

The case of *United States v. Willis,* 925 F.2d 59 (10th Cir. 1991) is inapplicable because the conviction used to enhance the defendant's sentence in that case was the defendant's own conviction. Here, Gary Young's conviction in a separate, pre-guideline case is being used to enhance Judge Collins' sentence in a guideline case. This is a denial of due process. Petitioner again refers this Court to *United States v. O'Campo,* No. 91-1089 (1st Cir. 1991), 51 Crim. L. Rep. 1554 (BNA), for the analogous

proposition that relevant conduct for sentencing of a conspirator *does not* include liability for substantive acts committed by others in furtherance of the conspiracy prior to the conspirator's joining the conspiracy.

CONCLUSION

Because the brief of the United States misses the mark in understanding the constitutional issues Petitioner has raised, and because these constitutional issues are of such importance and include novel issues of due process and fair trial, Petitioner submits this Court should grant a Writ of Certiorari.

Respectfully submitted,

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